

# ESSAY

## RACE AND SELECTIVE LEGAL MEMORY: REFLECTIONS ON *INVENTION OF A SLAVE*

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*In 1858, the United States Attorney General issued an opinion, *Invention of a Slave*, declaring inventions by African Americans, enslaved and free, unpatentable. Within a few years, legal changes that abolished the law of slavery rendered the opinion obsolete, and it became forgotten, dropped from legal memory. Combining history and Critical Race Theory, this Essay repositions the opinion as a remembered legal story and argues that law’s selective memory has carried a cost. I excavate the generations of African American activists who researched and wrote about the opinion and its backstory of an enslaved blacksmith who invented an innovative plow. Setting their storytelling in the context of post-Emancipation advocacy for the “rights of belonging,” I demonstrate the political stakes of their efforts in the relationship among inventive ability, patents, and citizenship. I reflect on my first encounters with *Invention of a Slave* as an obscure part of the antebellum past and on the new perspective gained from this history of remembering. I argue that these stakes persist, making this story part of the living present of race and law. I use this personal storytelling to consider the costs of legal forgetting and the possibilities of mitigation both in this case study, with implications for the patent system and our ongoing national conversation about paths to citizenship, and in the broader projects of curating law’s memory and fulfilling law’s formal promises of racial equality.*

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### INTRODUCTION

In 1858, Attorney General Jeremiah S. Black issued an opinion on the patentability of a “new and useful machine invented by a slave.”<sup>1</sup> He needed only three sentences to explain that an invention by an enslaved inventor could not be patented. The Attorney General relied on the Supreme Court’s holding the previous year in *Dred Scott v. Sandford* that African Americans were not citizens, whether free or enslaved.<sup>2</sup> Without the ability to swear an oath of citizenship, enslaved persons could not apply for patents.<sup>3</sup> This reasoning also placed free African Americans outside the bounds of patent law.<sup>4</sup> Further, the Attorney General declared that the owner of an enslaved inventor could not patent the invention,<sup>5</sup> as the owner was barred by the statutory requirement that only the “original and first inventor” could receive a patent.<sup>6</sup> His opinion, *Invention of a Slave*, created a formal racial barrier to the United States patent system, which free African Americans had previously accessed.<sup>7</sup>

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1. *Invention of a Slave*, 9 Op. Att’y Gen. 171, 171 (1858).

2. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 413 (1857) (stating that neither free nor enslaved blacks are “citizens within the meaning of the Constitution of the United States”); *Invention of a Slave*, 9 Op. Att’y Gen. at 171 (stating that a slave’s invention could not receive a patent given “the present state of the law”).

3. Patent Act of 1836, ch. 357, § 6, 5 Stat. 117, 119 (1836).

4. *Invention of a Slave*, 9 Op. Att’y Gen. at 171 (adopting the reasoning of the patent commissioner). For the reasoning of the patent commissioner, see Letter from Joseph Holt, Comm’r of Patents, U.S. Patent Office, to Oscar J.E. Stuart (Nov. 24, 1857), reprinted in Brian L. Frye, *Invention of a Slave*, 68 Syracuse L. Rev. 181, 194 (2018); Letter from Joseph Holt, Comm’r of Patents, U.S. Patent Office, to Jacob Thompson, Sec’y, U.S. Dep’t of the Interior (Dec. 12, 1857), reprinted in Frye, *supra*, at 195. As a comprehensive article on the opinion, Frye’s *Invention of a Slave* is an invaluable resource. My purpose in this Essay is not to repeat Frye’s research but rather to ask a different set of questions by interrogating the forgotten writers whose efforts allow us to remember the opinion.

5. See *Invention of a Slave*, 9 Op. Att’y Gen. at 171–72.

6. Ch. 357, § 6, 5 Stat. 117, 119.

7. This racial barrier was only erected against African Americans. A citizen of another country, including African countries, could access the system by swearing an oath declaring “of what country he is a citizen.” Ch. 357, § 6, 5 Stat. 117, 119.

Both enslavers and anti-slavery advocates expressed outrage about the opinion, but amid the national tumult over slavery that *Dred Scott* singularly failed to resolve, the controversy was soon overtaken by events in Bleeding Kansas, the presidential election of 1860, secession, and, ultimately, the Civil War (1861–1865). Within a few years, the law changed. Edward Bates, Attorney General under President Abraham Lincoln, issued an opinion stating that, contrary to *Dred Scott*, all natural-born Americans regardless of color or race were citizens, and the Reconstruction Amendments and early federal civil rights legislation abolished the law of slavery, rendering *Invention of a Slave* obsolete.<sup>8</sup>

As lawyers, we have a collective memory, curated by law reviews, as well as by published cases, treatises, and the content of law school classes—a memory both continuous and changeable.<sup>9</sup> *Invention of a Slave* was dropped from that memory, uncited in judicial opinions and infrequently discussed, even in patent law scholarship.<sup>10</sup> As legal scholar Brian Frye explained when analyzing the opinion as “a forgotten IP case,” lawyers forgot it for “the best reason.”<sup>11</sup> The formal racial barrier to patents it had erected was swept away, never to return.

While there are sound reasons why lawyers do not continue to cite and discuss obsolete rulings, there are always exceptions.<sup>12</sup> The national controversy that prompted *Dred Scott*, the heated debates about the opinion after it issued, and the bloody war and constitutional changes that rendered it obsolete have kept that opinion in the pantheon of significant

8. U.S. Const. amends. XIII, XIV, XV; Civil Rights Act of 1866, ch. 36, 14 Stat. 27 (1866); Citizenship, 10 Op. Att’y Gen. 382 (1862).

9. What I am calling a curated legal memory is related to the legal “canon” or “canons,” which are “a set of standard texts, approaches, problems, examples, or stories that . . . members repeatedly employ or invoke.” J.M. Balkin & Sanford Levinson, *Legal Canons*, at ix (J.M. Balkin & Sanford Levinson eds., 2000); see also J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963, 1024 (1998) [hereinafter Balkin & Levinson, *Canons of Constitutional Law*] (arguing that the cases and materials discussed in casebooks and legal publications create a “world” that “shapes our imaginations”); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 4 (1983) (choosing the term “*nomos*” to describe the normative world of the law created by narratives); Shubha Ghosh, *Introduction: A Duty to Remember*, 68 Syracuse L. Rev. 1, 1 (2018) (examining forgotten cases to consider the construction and contingency of the legal canon); Judith Resnik, *Constructing the Canon*, 2 Yale J.L. & Human. 221, 221 (1990) (noting that legal texts determine “what (and who) is given voice; who privileged, repeated, and invoked; who silenced, ignored, submerged, and marginalized”). I am using legal memory broadly to encompass legal stories that are included in formal legal publications, even those that are not repeatedly invoked nor part of legal pedagogy.

10. For a rare exception to this legal forgetting, see Chas. E. Tullar, *Parties in General*, 1 J. Pat. Off. Soc’y 131, 132 (1918). For other examples, see *infra* notes 62, 150 and accompanying text.

11. Frye, *supra* note 4, at 182; Ghosh, *supra* note 9, at 8 (introducing the symposium issue on forgotten IP cases and defining “case” broadly to include *Invention of a Slave*).

12. See, e.g., Balkin & Levinson, *Canons of Constitutional Law*, *supra* note 9, at 1001 (noting that judicial opinions and new legislation shape the legal canon).

cases we continue to teach and discuss.<sup>13</sup> *Invention of a Slave* appears to be a mere footnote to that significant opinion. The epic saga of Dred and Harriett Scott and their multiple legal battles became a matter of national import as their fight for freedom ended up in the Supreme Court.<sup>14</sup> The brief attorney general opinion, in contrast, echoes the same “struggle over the ideology of slavery” within the “microcosm” of the patent office, a minor bureau of the antebellum government.<sup>15</sup>

Even as a small-scale story of slavery in the antebellum United States, *Invention of a Slave* provides a poignant example of the contradictions between humanity and property that challenged and distorted American law in a slave society.<sup>16</sup> It forces us to acknowledge that the ideology of slavery reached into the technical bureaucracy of the patent office, an area of law and of the administrative state frequently considered outside politics.<sup>17</sup> The dry lines of the opinion expose the breathtaking claim by an enslaver to the mental labor of another person—an ultimate claim of whiteness as intellectual property—and another frontier in the “myriad and nefarious uses of slave property.”<sup>18</sup> These features make *Invention of a Slave* a story worth remembering.

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13. See Daniel A. Farber, A Fatal Loss of Balance: *Dred Scott* Revisited, 39 Pepp. L. Rev. 13, 16–21 (2011) (situating *Dred Scott* within the broader historical context of disputes over slavery in U.S. territories); Jamal Greene, The Anticanon, 125 Harv. L. Rev. 379, 385, 436–42 (2011) (arguing that *Dred Scott* and other “anticanonical” overruled decisions are remembered and taught as part of “contingent professional practice” for historical reasons); Gerard N. Magliocca, Preemptive Opinions: The Secret History of *Worcester v. Georgia* and *Dred Scott*, 63 U. Pitt. L. Rev. 487, 488 (2002) (describing *Dred Scott* as an example of an opinion generated in a time of “great constitutional stress”). For arguments about the continuing relevance of *Dred Scott*, see generally Balkin & Levinson, Canons of Constitutional Law, supra note 9, at 976; Jack M. Balkin & Sanford Levinson, Thirteen Ways of Looking at *Dred Scott*, 82 Chi.-Kent L. Rev. 49 (2007); Sanford Levinson, Slavery in the Canon of Constitutional Law, 68 Chi.-Kent L. Rev. 1087, 1090–91 (1993). For contemporary scholarship analyzing *Dred Scott*, see generally, e.g., Jennifer M. Chacón, Citizenship and Family: Revisiting *Dred Scott*, 27 Wash. U. J.L. & Pol’y 45 (2008); Justin Buckley Dyer, The Substance of *Dred Scott* and *Roe v. Wade*, 16 Geo. J.L. & Pub. Pol’y 421 (2018); Symposium, 150th Anniversary of the *Dred Scott* Decisions, 82 Chi.-Kent L. Rev. 1 (2007).

14. For Harriett Scott’s story and legal battles, see generally Lea VanderVelde & Sandhya Subramanian, Mrs. Dred Scott, 106 Yale L.J. 1033 (1997).

15. Frye, supra note 4, at 229.

16. For an in-depth discussion of these contradictions, see generally, e.g., Robert M. Cover, Justice Accused: Antislavery and the Judicial Process (1975); Ariela J. Gross, Double Character: Slavery and Mastery in the Antebellum Southern Courtroom (2000); Saidiya V. Hartman, Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America (1997).

17. For challenges to this view, see Shobita Parthasarathy, Patent Politics: Life Forms, Markets, and the Public Interest in the United States and Europe 3–5 (2017); Kara W. Swanson, Intellectual Property and Gender: Reflections on Accomplishments and Methodology, 24 Am. U. J. Gender, Soc. Pol’y & L. 175, 182, 185–86 (2015); Anjali Vats & Deidré A. Keller, Critical Race IP, 36 Cardozo Arts & Ent. L.J. 735, 740 (2018).

18. Hartman, supra note 16, at 24; Vats & Keller, supra note 17, at 758 (citing Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1707 (1993)).

One of history's projects is the recovery of missing stories. This goal has always been urgently foregrounded in African American history as a corrective to the whitewashed narrative that dominated professionalized history in the United States from its late-nineteenth-century inception.<sup>19</sup> *Invention of a Slave*, however, has never been a "forgotten" or missing story.<sup>20</sup> For over 150 years, African American activists have remembered and written about the opinion in many venues excluded from our collective legal memory.<sup>21</sup> Their remembering was not casual storytelling but rather deliberate, strategic, and political. Understanding the purpose of their efforts reveals the opinion's continuing relevance to our collective effort to understand what the law is, how it is working, and how it might be changed in the service of justice.<sup>22</sup> I offer *Invention of a Slave* as a case study of race and selective legal memory, tracing the color line that demarcates legal memory and the costs of that line.<sup>23</sup>

I begin with my first encounters with *Invention of a Slave* and its backstory as told in African American "sites of memory."<sup>24</sup> I then foreground the nineteenth- and twentieth-century storytellers to understand by whom

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19. See John Hope Franklin, George Washington Williams and the Beginnings of Afro-American Historiography, 4 *Critical Inquiry* 657, 658 (1978) (describing disregard for the African American perspective as American history professionalized). For an influential early example of corrective history, see generally W.E. Burghardt Du Bois, *Black Reconstruction: An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860–1880* (1935).

20. In asking legal scholars to consider *Invention of a Slave* as a *remembered* opinion, this Essay thus diverges from other important scholarship recovering missing stories and arguing for the significance of forgotten cases. See, e.g., Fran Ansley, Recognizing Race in the American Legal Canon, in *Legal Canons*, supra note 9, at 238, 241 (calling for the resurrection and construction of counternarratives to challenge the "grand racial silences" of the legal canon); David Fontana, A Case for the Twenty-First Century Constitutional Canon: *Schneiderman v. United States*, 35 *Conn. L. Rev.* 35, 37 & n.8 (2002) (arguing for teaching *Schneiderman* and collecting articles arguing for the recognition of other forgotten cases); Richard H. Pildes, Democracy, Anti-Democracy, and the Canon, 17 *Const. Comment.* 295, 296–97 (2000) (arguing that *Giles v. Harris* has constitutional significance); VanderVelde & Subramanian, supra note 14, at 1035 (recounting Harriet Scott's legal battles as "compensatory" history).

21. See, e.g., Frye, supra note 4, at 182 nn.3 & 8, 187 nn.55 & 57 (citing publications discussed throughout this Essay).

22. For discussion of my use of "our," see *infra* text accompanying notes 159–162.

23. My use of "color line" echoes W.E.B. Du Bois's use of the term. W.E. Burghardt Du Bois, *The Souls of Black Folk: Essays and Sketches*, at vii (1903) [hereinafter Du Bois, *The Souls of Black Folk*].

24. Vats & Keller, supra note 17, at 768 (citing earlier scholarship drawing upon African American literature as a "site[] of memory"). In including my own stories, I use a frequent methodology of Critical Race Theory. See Khiara M. Bridges, *Critical Race Theory: A Primer* 15–16 (2019) (narrating the author's encounter with Critical Race Theory); Storytelling, Counter-Storytelling, and Naming One's Own Reality, in *Critical Race Theory: The Cutting Edge* 61, 61–121 (Richard Delgado and Jean Stefancic eds., 3d ed. 2013) (introducing and reprinting examples of Critical Race Theory storytelling); Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 *Mich. L. Rev.* 2411, 2411–15 (1989) (describing the turn to storytelling and its functions in the context of racial reform).

and in what places the opinion was remembered. With an appreciation of the opinion as a remembered story, I can then ask, why? What were the stakes that drove African American activists and leaders to tell and retell the story of the enslaved inventor and his exclusion from the patent system? I argue that this memory work was performed in support of fights for the “rights of belonging,” the various civil rights that signal and accompany inclusion.<sup>25</sup> Between the formal lines of the opinion, these activists read an unintended message that patents could be political tools used to oppose anti-black racism and racist laws. They mobilized patents as government certifications that their recipients had a prized mental ability, inventiveness, in order to undercut the logic of racism in its shifting guises, including scientific racism, white supremacy, and the pernicious bigotry of low expectations.

This labor resulted in publications that remained on the other side of a color line, excluded from the acknowledged repositories of legal memory. This exclusion has carried costs, as we in law have failed to appreciate and participate in what was always in part a *legal* effort, even though it occurred outside formal legal publications. These storytellers, by telling one of law’s stories, were seeking legal change. Our legal erasure of both the opinion and storytellers has allowed us to encounter a well-remembered story as “forgotten” and remain blind to its relevance. Acquiring a new perspective transforms *Invention of a Slave* from an oft-overlooked piece in the vast mosaic of law and slavery in the antebellum United States into part of the post-Emancipation history of race and law—a history characterized by never-ending and always-changing campaigns to fulfill the formal promises of the Reconstruction Amendments to bring African Americans into law and society as citizens. This history has not ended, but rather remains “something that is happening,”<sup>26</sup> as we continue to debate what Barbara Welke has memorably called the “borders of belonging,” that is, the contours of citizenship and Americanness as shaped in law and society.<sup>27</sup>

As a case study making law’s color line visible, the history of remembering and forgetting *Invention of a Slave* exposes the persistent whiteness of both the authors and content of curated legal memory, linking that persistence to the persistence of racial inequality in all aspects of law and

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25. Denise C. Morgan & Rebecca E. Zietlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 U. Cin. L. Rev. 1347, 1348, 1391–93 (2005) (expanding on constitutional law scholar Kenneth Karst’s use of belonging in his work on equal citizenship).

26. Devon W. Carbado & Rachel F. Moran, *The Story of Law and American Racial Consciousness: Building a Canon One Case at a Time*, 76 UMKC L. Rev. 851, 852 (2008) (noting that “national rhetoric” has been used to keep race “something that happened, not something that is happening”); see also Bridges, *supra* note 24, at 7 (noting that Critical Race Theory foundationally assumes that “race remains highly significant” in the United States).

27. Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* 4–13 (2010).

society. Recognizing that the costs of that line are being paid in the present is in itself significant, challenging all of us who participate in curating law's memory. Further, understanding the link among patents, African American inventive ability, and belonging offers opportunities to contribute to the burgeoning project of Critical Race IP to "remak[e]" intellectual property to "heal the wounds of racism" at a time when intellectual property is ever more important in the economy and law.<sup>28</sup> I end by reflecting on teaching and researching patent law and policy with the recognition that I do so as a participant in the present-day happening of race and citizenship.

### I. INVENTION OF A SLAVE: THE STORY

As a former patent attorney turned legal scholar, I first encountered *Invention of a Slave* as an appropriately forgotten opinion. I saw no relevance to my former practice or to teaching patent law. I thought of it as a minor piece of patent lore, remaining firmly within my legal mindset of sorting precedents into "good" versus "bad" law. Nothing in my background as a white American, trained in science, law, and history in majority-white institutions, led me to see it differently. Even as I researched the history of the patent system and began to consider the history of black inventors, this mindset affected my reading of a pamphlet published in 1913, *The Colored Inventor: A Record of Fifty Years*.<sup>29</sup> I knew that its author, Henry E. Baker, was an African American lawyer and patent office employee, and I appreciated that the pamphlet contained one of the earliest lists of African Americans who had received U.S. patents. I am embarrassed to admit how long I had that pamphlet in my research collection and how often I had referred to its contents before I paid much attention to Baker's discussion of *Invention of a Slave* or bothered to ask myself why Baker had gone to the trouble to write the pamphlet, so convenient for twenty-first century historians researching black inventors, and why it was considered worth publishing. Staring me in the face, once I chose to look, was the information that the pamphlet was printed to commemorate the fiftieth anniversary of Emancipation by *The Crisis*, the publishing arm of the then-newly formed National Association for the Advancement of Colored People (NAACP).<sup>30</sup> This fledgling civil rights organization had devoted some of its limited resources to publicizing this overruled opinion and black inventors. Why? This question led me to the storytellers who are the focus of this Essay, including Baker.

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28. Vats & Keller, *supra* note 17, at 776–77, 795.

29. Henry E. Baker, *The Colored Inventor: A Record of Fifty Years* (1913) [hereinafter Baker, *The Colored Inventor*].

30. *Id.*; Patricia Sullivan, *Lift Every Voice: The NAACP and the Making of the Civil Rights Movement* 1, 15–18 (2009). Why did I eventually notice, long after I first read the pamphlet? I was typing a citation to the pamphlet, following the conventions of history journals, which, unlike law reviews, require inclusion of the publisher's name.

As Baker, who earned his law degree from Howard University,<sup>31</sup> well knew, the law has always remembered *Invention of a Slave* in the sense that it, like all attorney general opinions, was published as an official government document.<sup>32</sup> In those pages, we, like Baker a century ago, can read the opinion, one amid the many issued by Jeremiah Black in his three years serving as Attorney General in the Administration of President James Buchanan.<sup>33</sup>

I fully concur with the Commissioner of Patents in the opinion he has given on the application of Mr. O.T.E. Stewart, of Mississippi. For the reasons given by the Commissioner, I think as he does, that a machine invented by a slave, though it be new and useful, cannot, in the present state of the law, be patented. I may add that if such a patent were issued to the master, it would not protect him in the courts against persons who might infringe it.<sup>34</sup>

There is much more to the story of *Invention of a Slave*, however, than these three sentences. While the law and practice of the nineteenth-century patent office kept pending applications secret, the applicant in this case publicized his application widely, leaving an ample paper trail about the invention, the enslaved inventor, and his enslaver. The applicant, white Mississippi farmer, slaveowner, and lawyer Oscar J.E. Stuart (misspelled as “Stewart” in the opinion and with incorrect initials), corresponded about the application with two Mississippi senators, the Patent Commissioner, and the Secretary of the Interior.<sup>35</sup> It is only through Oscar’s words that we learn a few facts about the inventor, an enslaved man named Ned who worked as a blacksmith. Oscar’s correspondence and the custom of slavery denied Ned any known second name. To avoid replicating that mark of subordination, I refer to the other men in this story by their first names as well.

Despite the rapid legal forgetting of *Invention of a Slave*, these letters have not lain untouched and forgotten in dusty archives. Beginning soon after the Civil War, African American writers and the occasional white historian referenced and republished Jeremiah’s opinion and used the other

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31. Henry E. Baker, *in* *Twentieth Century Negro Literature*; or, *A Cyclopaedia of Thought on the Vital Topics Relating to the American Negro by One Hundred of America’s Greatest Negroes* (D.W. Culp ed., 1902) [hereinafter *Henry E. Baker Biography*] (unpaginated biography between pages 398–99).

32. Henry E. Baker, *The Negro as an Inventor*, *in* *Twentieth Century Negro Literature*, *supra* note 31, at 399, 400 [hereinafter *Baker, The Negro as an Inventor*].

33. Jeremiah, a white Pennsylvania attorney, loyal Democrat, and former judge, served as Attorney General from March 6, 1857 until December 20, 1860, when he became Secretary of State for the remaining two-and-one-half months of the Buchanan Administration. Francis Newton Thorpe, *Jeremiah S. Black*, 50 *Pa. Mag. Hist. & Biography*, 117, 117 n.1 (1926).

34. *Invention of a Slave*, 9 *Op. Att’y Gen.* 171, 171–72 (1858).

35. Norman O. Forness, *The Master, the Slave, and the Patent Laws: A Vignette of the 1850s*, 12 *Prologue* 23, 23–25 (1980) (discussing the relevant materials in the National Archives); Dorothy Cowser Yancy, *The Stuart Double Plow and Double Scraper: The Invention of a Slave*, 69 *J. Negro Hist.* 48, 48–49 (1984) [hereinafter *Yancy, Stuart Double Plow*].

sources to reconstruct the story of Oscar and Ned, publishing summaries and even full transcriptions of the original handwritten manuscripts.<sup>36</sup> Tracing the multiple strands of this remembering takes us outside the largely white world of legal publishing, with its focus on precedent and tools for practicing lawyers, and into the world of African American thought and activism.

This is the story, which I am recounting not based on my own archival research, but from this remembering.<sup>37</sup>

Sometime before August 25, 1857, in or near Holmesville, then the county seat of Pike County in southwestern Mississippi, an enslaved African American man named Ned invented an improved “double Cotton Scrapper, and two plows.” The novel machine could “Scrape both Sides of the Cotton ridge at the same time, and plough out the middles or Spaces between the ridges,” leaving the ridges ready for hoeing.<sup>38</sup> This description is provided by Oscar. Ned’s voice is not heard in the sources, and we do not know when and how his story began, nor how it ended. Ned was described by Oscar as a “Smith,” a skilled artisan who worked as a blacksmith, fixing and making tools.<sup>39</sup> As an artisan, Ned might have been able to exercise some control over his labor. Perhaps he, like other skilled enslaved persons, was earning money through self-hire hoping to buy his own freedom or that of family members, although in a rural area, his opportunities would have been more limited than in a city.<sup>40</sup> Pike County had an agricultural economy, dependent on “King Cotton” and the labor of enslaved persons.<sup>41</sup> As a plantation owner, Oscar relied both on his real property, land, and his chattel property, the African American people whose lives he claimed. To Oscar, Ned was part of the “Estate of my deceased wife.”<sup>42</sup>

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36. See, e.g., Portia P. James, *The Real McCoy: African-American Invention and Innovation, 1619–1930*, at 49 (1989) [hereinafter James, *The Real McCoy*]; John Boyle, *Patents and Civil Rights in 1857–8*, 42 *J. Pat. Off. Soc’y* 789, 789–94 (1960) [hereinafter Boyle, *Patents and Civil Rights*]; Forness, *supra* note 35, at 26–27; Yancy, *Stuart Double Plow*, *supra* note 35, at 48–51.

37. The most complete recent account of *Invention of a Slave* is provided in Frye, *supra* note 4, at 189–209, based on archival work. While I occasionally refer to that article for details of the story not well-developed in earlier tellings, I cite to earlier publications whenever possible to demonstrate the scope of remembering.

38. Letter from Oscar J.E. Stuart to John A. Quitman, Senator, Miss. (Aug. 29, 1857), reprinted in Yancy, *Stuart Double Plow*, *supra* note 35, at 48, 49.

39. Letter from Oscar J.E. Stuart to Jacob Thompson, Sec’y, U.S. Dep’t of the Interior (Aug. 25, 1857), reprinted in Boyle, *Patents and Civil Rights*, *supra* note 36, at 789, 790.

40. Catherine W. Bishir, *Crafting Lives: African American Artisans in New Bern, North Carolina, 1770–1900*, at 6–7 (2013).

41. Martin J. Hardeman, *The Structure of Time: Pike County, Mississippi, 1815–1912*, at 3, 8 (1999).

42. Letter from Oscar J.E. Stuart to Jacob Thompson, Sec’y, U.S. Dep’t of the Interior, *supra* note 39, at 790.

Oscar saw commercial opportunity in Ned's double plow and scraper. He therefore sought a patent, a federal grant of exclusive rights that would allow him to monetize Ned's idea beyond his own farm, protecting his investment if he or his licensees were to make and sell the novel implement by allowing Oscar to sue imitators for infringement.<sup>43</sup> The simplest approach, and undoubtedly one taken repeatedly by other enslavers since the United States patent system began in 1790, would have been for Oscar to apply for the patent in his own name, swearing that he was the "original inventor" as the law required.<sup>44</sup> Had he done so, he almost certainly would have obtained a patent. And while such a patent would have been technically invalid because Oscar was not the inventor, who would have been in a position to challenge his claim?<sup>45</sup> Not Ned. Oscar threatened to "correct" Ned "according to our Southern usage" should he dare contact the patent office himself.<sup>46</sup> Oscar, however, sought to establish a precedent on what he thought was an unresolved legal question: "whether the master who has a property . . . in the fruits of the mind . . . of his slave . . . can obtain a patent when the invention is made by [the slave]."<sup>47</sup> He therefore submitted an application in which he swore he was Ned's legal owner and that Ned had invented the described invention, even including an affidavit purportedly by Ned himself, stating, in Oscar's words, "that he is the original inventor . . . and my slave."<sup>48</sup>

Oscar's effort to obtain a legal ruling confirming his broad view of property rights was no doubt motivated by his strong commitment to the racial ideology of the pro-slavery South. In pressing his claim, Oscar juxtaposed what he called the "Serville" race with the "Political" race to explain that the patent laws were written to benefit the "Political to the exclusion of the Serville race," that is, whites to the exclusion of blacks, and therefore, he should obtain a patent to Ned's invention.<sup>49</sup> Otherwise, he argued,

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43. Patent Act of 1836, ch. 357, § 6, 5 Stat. 117, 119 (1836). Note that before he formally applied for a patent, Oscar wrote both the Secretary of Interior and Mississippi Senator Quitman asking whether "the Master of a slave, can procure a patent, for a useful invention discovered by his slave," worried that the new Commissioner of Patents might not be "a Southern man . . . exempt from all the Prejudices, which might cloud the understanding of a man from a different latitude." Frye, *supra* note 4, at 189, 191 (first quoting Letter from Oscar J.E. Stuart to Jacob Thompson, Sec'y, U.S. Dep't of the Interior, *supra* note 39, at 789; then quoting Letter from Oscar J.E. Stuart to John A. Quitman, Senator, Miss., *supra* note 38, at 48–50). Oscar applied for a patent on November 15, 1857. Petition from Oscar J.E. Stuart to the Cong. of the U.S. (Dec. 18, 1857), reprinted in Frye, *supra* note 4, at 194.

44. Patent Act of 1836, § 6.

45. *Invention of a Slave*, 9 Op. Atty Gen. 171, 172 (1858) (noting invalidity).

46. Letter from Oscar J.E. Stuart to Jacob Thompson, Sec'y, U.S. Dep't of the Interior, *supra* note 39, at 791–94. Oscar's letter to Secretary Thompson is also quoted in James, *The Real McCoy*, *supra* note 36, at 49.

47. Letter from Oscar J.E. Stuart to Jacob Thompson, Sec'y, U.S. Dep't of the Interior, *supra* note 39, at 793 (calling this a question "upon which there is a diversity of opinion among men learned in the law").

48. *Id.*

49. Letter from Oscar J.E. Stuart to John A. Quitman, Senator, Miss., *supra* note 38, at 49.

the law unfairly deprived him of his full ability to exploit his property, limited to stealing Ned's labor and ideas but unable to exclude others from copying Ned's innovation.

Like many other enslavers who sought to apply the law of property to people, Oscar was caught in a contradiction. He was seeking to exploit the valuable "fruits of the mind" of a man that he was simultaneously claiming to own because Ned was, in Oscar's worldview, a member of a distinct and inferior race characterized by "general Stupidity."<sup>50</sup> Acknowledging Ned's abilities through the grant of a patent to his invention, even if the patent were granted to Oscar, would undermine the fragile construct of white supremacy by recognizing that Ned had conceived and created a novel machine that no white man had previously devised. Yet Oscar left no sign that this contradiction troubled him or that Ned's ingenuity altered his racial views. Instead, he claimed that "the benign institution of slavery" and the "ameliorating influence of the Christian religion" were "gradually effacing . . . that mental stupidity and sloth" that otherwise characterized all enslaved persons of African descent.<sup>51</sup> Oscar believed that Mississippi Senator John Quitman, a "militant secessionist," would share his views about both race and patents, as would the Secretary of Interior Jacob Thompson, a "Southern man."<sup>52</sup> To him, chattel slavery meant ownership alike of the labor of the hands and the fruit of the mind, which necessarily must include patent rights.

By his application, Oscar not only exposed a fallacy at the heart of the ideology of slavery but also created a clash between the law of slavery and the law of patents. The law of slavery attempted to severely limit the legal personhood of those whom the law categorized as human chattel, and the law of patents prioritized the human act of creation, limiting these federal grants to the "original inventor," who was required to swear an oath of inventorship and citizenship and to whom a patent would be issued.<sup>53</sup> The Patent Commissioner returned Oscar's application as unprocessable because it did not contain an oath of the inventor, Ned. The Commissioner further believed that Ned as an enslaved person was "incompetent" to take the oath, leaving Ned's invention unpatentable by anyone.<sup>54</sup> An enslaved inventor was legally noncognizable and patent law did not allow anyone, even the inventor's owner, to claim a patent in their stead. Oscar was not disturbed by Ned's lack of legal status, but he found

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50. *Id.*

51. Petition from Oscar J.E. Stuart to the Cong. of the U.S., *supra* note 43, at 204–05.

52. Hardeman, *supra* note 41, at 20; Letter from Oscar J.E. Stuart to John A. Quitman, Senator, Miss., *supra* note 38, at 49. For the background of Secretary of the Interior Jacob Thompson, who resigned from the Buchanan Administration on January 8, 1861 and became Inspector General of the Confederate Army, see Frye, *supra* note 4, at 193.

53. Patent Act of 1836, ch. 357, § 6, 5 Stat. 117, 119 (1836).

54. Letter from Joseph Holt, Comm'r of Patents, U.S. Patent Office, to Jacob Thompson, Sec'y, U.S. Dep't of the Interior, *supra* note 4, at 195–98; Letter from Joseph Holt, Comm'r of Patents, U.S. Patent Office, to Oscar J.E. Stuart, *supra* note 4, at 194.

the refusal of the Patent Commissioner to issue the requested patent “monstrous.”<sup>55</sup> He complained to the Secretary of the Interior, to whom the Commissioner reported, and the Secretary referred the question to Jeremiah.<sup>56</sup> Jeremiah, serving a President who supported the *Dred Scott* decision,<sup>57</sup> had no difficulty affirming the Commissioner’s ruling that Ned’s invention was unpatentable due to the lack of the original inventor’s ability to swear an oath of inventorship.

Oscar, after failing to sway the patent office, twice petitioned Congress to amend the patent law, and again failed.<sup>58</sup> Despite those setbacks, he proceeded with his commercialization plans, offering what he called the “Stuart Double Plough and Scraper” for sale.<sup>59</sup> Other enslavers also found their plans stymied by this ruling in the late 1850s and 1860s. The African Americans who remembered and retold the story of *Invention of a Slave* often also told the story of Benjamin Montgomery, another skilled African American enslaved in Mississippi. His enslaver, Joseph Davis, unsuccessfully sought a patent to Montgomery’s invention, an improved boat propeller, through his brother, then-Senator Jefferson Davis, the future President of the Confederacy.<sup>60</sup> Yet soon the inventor Benjamin Montgomery and

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55. Letter from Oscar J.E. Stuart to Jacob Thompson, Sec’y, U.S. Dep’t of the Interior, *supra* note 39, at 793.

56. Frye, *supra* note 4, at 199; Letter from Oscar J.E. Stuart to Jacob Thompson, Sec’y, U.S. Dep’t of the Interior, *supra* note 39, at 791–94.

57. Farber, *supra* note 13, at 39–40.

58. Petition from Oscar J.E. Stuart to the Cong. of the U.S., *supra* note 43, at 202–05. A bill to allow enslavers to patent the inventions of the people they enslaved was introduced but, despite the efforts of Mississippi Senator Albert Gallatin Brown, failed to advance. S. 548, 35th Cong. (1859), reprinted in Frye, *supra* note 4, at 206–07. In 1861, Massachusetts Senator Charles Sumner, a prominent white abolitionist, offered a resolution suggesting that the law be amended to restore the right to receive patents to free African Americans, which also led nowhere. Charles Sumner, *Denial of Patents to Colored Inventors*, in 6 *The Works of Charles Sumner* 144 (1880); Frye, *supra* note 4, at 224–25 (citing the *Congressional Globe*).

59. James, *The Real McCoy*, *supra* note 36, at 51–52; Yancy, *Stuart Double Plow*, *supra* note 35, at 50.

60. Henry E. Baker, *The Negro in the Field of Invention*, 2 *J. Negro Hist.* 21, 24 (1917) [hereinafter *Baker, Negro in the Field of Invention*]; see also James, *The Real McCoy*, *supra* note 36, at 52–53. In correspondence with Baker, Isaiah Montgomery related that his father sought a patent in his own name once he was no longer enslaved but failed to receive one, and that his efforts to commercialize his novel propeller were also largely unsuccessful. James, *The Real McCoy*, *supra* note 36, at 76. When the pro-slavery politicians of the new Confederate States of America drafted its patent law, they included a provision that allowed enslavers to patent inventions of enslaved persons. Act of May 21, 1861, ch. 46, § 50, *Pub. Laws, Provisional Cong., 2d Sess.*, reprinted in *The Statutes at Large of the Provisional Government of the Confederate States of America* 1, 148 (James M. Matthews ed., 1864). Note that there is no evidence that Oscar, after Mississippi joined the Confederacy, took advantage of this law to obtain a patent. H. Jackson Knight, *Confederate Invention: The Story of the Confederate States Patent Office and Its Inventors* 318, 320 (2012).

both Davis brothers, as well as Oscar, Ned, and Jeremiah, had more pressing issues of war and freedom to occupy them.<sup>61</sup>

After the Civil War, *Invention of a Slave* sat on law library shelves, uncited in the legal literature.<sup>62</sup> But as proven by the recitation I just provided, it was continuously remembered through other networks of publication.<sup>63</sup> Henry Edwin Baker, who has been called “the Father of Black Inventor Research,” can help us understand the stakes of that remembering and the costs of our selective legal memory.<sup>64</sup>

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61. Benjamin Montgomery became an African American leader in Mississippi during and after the war. For detailed histories of Joseph Davis and the postwar experiment by Benjamin Montgomery to establish an African American community at Joseph’s former plantation, Davis Bend, see Janet Sharp Hermann, *Joseph E. Davis: Pioneer Patriarch* 57–59 (1990); Janet Sharp Hermann, *The Pursuit of a Dream* 83–151 (1981).

62. While a search in legal databases uncovers few citations to *Invention of a Slave*, in addition to the twentieth-century exceptions provided, *supra* notes 10, 36, recently a handful of legal scholars have remembered the opinion. Kali Murray, *A Politics of Patent Law: Crafting the Participatory Patent Bargain* 28–29 (2013); Keith Aoiki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 *U.C. Davis L. Rev.* 717, 743 (2007); Shontavia Johnson, *America’s Always Had Black Inventors—Even When the Patent System Explicitly Excluded Them*, *Conversation* (Feb. 14, 2017), <https://theconversation.com/americas-always-had-black-inventors-even-when-the-patent-system-explicitly-excluded-them-72619> [<https://perma.cc/GE2E-652C>]; see also Kathleen Wills, *Patenting an Invention as a Free Black Man in the Nineteenth Century*, 101 *J. Pat. & Trademark Off. Soc’y* 206, 207 & n.5 (2019) (citing Frye, *supra* note 4).

63. Legal scholars are not alone in seeing *Invention of a Slave* through a narrow lens that limits its significance to the antebellum period and in failing to look outside their preferred literature. Norman O. Forness, a historian researching the Department of the Interior, dubbed the episode a “vignette of the 1850s” presumably because it was a side note to his main interest in presidential politics and administration. Forness, *supra* note 35, at 23. Like Frye three decades later, Forness emphasized the affair as an example of the “stark incongruity” between the slavery system and patent law. See *id.* at 27. Forness did not cite Baker’s discussions of the opinion, see *supra* notes 29, 32, 60; Yancy’s previous article, see *supra* note 35; or Boyle’s publication of the same letters, see *supra* note 36; see also Luke Ward Conerly, *Pike County, Mississippi, 1798–1876: Pioneer Families and Confederate Soldiers Reconstruction and Redemption, Dedication*, 126 (1909) (recounting the story as part of reminiscences of white “patriotic and devoted women and Confederate soldiers”); Hardeman, *supra* note 41, at 13 (remembering Ned as part of the history of the Pike County antebellum community); John Hebron Moore, *Agriculture in Ante-Bellum Mississippi 187–88* (1958) (remembering Ned’s invention in the context of understanding plows used on antebellum cotton farms in Mississippi).

64. Keith C. Holmes, *Black Inventors: Crafting Over 200 Years of Success* 14 (2008). Holmes considered himself to be continuing Baker’s work. Just as Baker worked for years to identify African American patentees, Holmes spent twenty years collecting the information in his book. *Id.* at 13.

## II. REMEMBERING THE STORYTELLERS

A. *At the Nadir*

When Baker published his pamphlet in 1913, he was a second assistant patent examiner, one of the first African American white-collar employees of the patent office.<sup>65</sup> At the turn of the twentieth century, Washington, D.C., was home to a vibrant community of well-educated African Americans, many of whom had moved there to pursue opportunities after the Civil War.<sup>66</sup> Baker was one of these. The federal government offered possibilities of white-collar employment unavailable to African Americans in other sectors.

Baker had been born in Lowndes County, Mississippi, in 1857, the year Ned invented his plow.<sup>67</sup> While the brief biography of Baker published during his lifetime does not specify whether he was born free or enslaved, it is likely that he, like Ned, was enslaved.<sup>68</sup> Coming of age after Emancipation, however, Baker had more opportunity to profit from his own mental labor. After the war, he attended school in Columbus, Mississippi, and in 1874 became the third African American to enter the United States Naval Academy in Annapolis, Maryland. The Academy offered not only a college education with an emphasis on technical subjects but also a pathway to becoming a naval officer, a position from which African Americans had previously been excluded. Baker, like the two earlier black cadets, endured relentless and severe harassment from his white

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65. See Henry E. Baker Biography, *supra* note 31; Patricia Carter Sluby, *The Inventive Spirit of African Americans: Patented Ingenuity*, at xxxiii (2004) [hereinafter *Sluby, Inventive Spirit*]. Patricia Carter Sluby identifies, based on oral history, Allen Bland as the first black patent examiner, serving from 1870–1874, and Anthony Bowen as the first African American patent clerk in the 1840s. *Id.* at xxxii, 54. Rayvon Fouché identifies Baker as the first African American patent examiner. Rayvon Fouché, *Black Inventors in the Age of Segregation: Granville T. Woods, Lewis H. Latimer & Shelby J. Davidson* 9 (2003); see also Kenneth W. Dobyns, *The Patent Office Pony: A History of the Early Patent Office 177* (Docent Books 2007) (1997) (noting that Bland was clerk in the patent office while attending law school at Howard University, but that there is no documentary evidence that he ever served as examiner).

66. See Elizabeth Dowling Taylor, *The Original Black Elite: Daniel Murray and the Story of a Forgotten Era* 58 (2017) (“Government positions, government protections, and good education opportunities had led to an influx of aspiring middle-class black migrants. Some said Washington was a ‘colored man’s paradise.’”).

67. The details of Baker’s life described in this paragraph are taken from Henry E. Baker Biography, *supra* note 31, and Robert J. Schneller, Jr., *Breaking the Color Barrier: The U.S. Naval Academy’s First Black Midshipmen and the Struggle for Racial Equality* 34–41, 45 (2005).

68. In 1850, the census recorded twenty-eight free blacks in Lowndes County, along with over 12,000 enslaved persons. Mississippi, *in* Bureau of the Census, U.S. Dep’t of Commerce, *The Seventh Census of the United States: 1850*, at 447 (1853). By 1860, the government counted only four free blacks remaining, while the enslaved population had increased to over 16,000. Mississippi, *in* Bureau of the Census, U.S. Dep’t of Commerce, *Population of the United States in 1860; Compiled from the Original Returns of the Eighth Census* 267, 269 (1864).

classmates. While he remained “proud[] and defiant” in the face of the abuse, he, like the two before him, left before graduation.<sup>69</sup> After Baker, no African Americans entered the Academy until 1936, as the opportunities of Reconstruction vanished.<sup>70</sup>

When he left the Academy in 1877, Baker reportedly began at the patent office as a copyist—a clerical position—while also finishing his degree at the Ben-Hyde Benton School of Technology.<sup>71</sup> He earned his law degree in 1881.<sup>72</sup> Using his training, Baker was able to work his way into the examining corps by 1902.<sup>73</sup> Examiners investigate each patent application to determine whether the claimed invention meets the legal criteria of patentability, in part by comparing the described invention to the previous state of the technology.<sup>74</sup> Although he was never promoted above second assistant—evidence of a glass ceiling—he became, according to an admiring contemporary, one of the “most useful” of the “educated colored men” in Washington, D.C.<sup>75</sup>

In addition to his federal employment, Baker served as an officer in multiple organizations within the black community, including his church and a bank. In fact, he was “connected with almost every well-directed

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69. Schneller, *supra* note 67, at 34–41, 45.

70. The cadet who entered in 1936 was also unsuccessful in the face of harassment. *Id.* at 85, 103–04. Wesley Brown became the first black graduate of the Academy in 1949, having attended the academy alongside future President Jimmy Carter. *Id.* at ix–x.

71. Although Baker’s biography provides this information, see Henry E. Baker Biography, *supra* note 31, I have found no direct evidence of a Ben-Hyde Benton School of Technology in Washington, D.C. in 1877. In 1874, Professor Benjamin Hyde Benton, who had been engaged in technical and scientific education since before the Civil War, was president of the New Market Polytechnic Institute in New Market, Virginia, over 100 miles from D.C. See Brenda E. Stevenson, *Life in Black and White: Family and Community in the Slave South* 29 (1996) (noting that Benton co-founded a technical institute in Loudoun County, Virginia in 1855); U.S. Dep’t of the Interior, Report of the Commissioner of Education for the Year 1874, at 709 (1875) (listing Benton as the President of the New Market Polytechnic Institute in 1874); J.P. Stirewalt, *A Brief History of Rader’s Lutheran Church Near Timberville, Virginia (Rockingham County) from May 20, 1765 to April 11, 1921*, at 50 (1922) (noting that Benton was a “distinguished teacher of the sciences” at New Market Polytechnic Institute from 1870 to 1873). In 1880, Benton was listed in a Washington, D.C. directory as the principal of the Polytechnic College of the National University, which had been incorporated in 1879. Wm. H. Boyd, *Boyd’s Directory of the District of Columbia* 824–25 (1880); Harvey W. Crew, *Centennial History of the City of Washington, D.C.* 510 (1892). It is possible that Benton briefly ran a school called formally or informally after himself in Washington, D.C., between these commitments, or that the name given in this biography was an alternative or informal name for one of the institutions where Benton taught.

72. Henry E. Baker Biography, *supra* note 31.

73. *Id.*

74. See General Information Concerning Patents: Examination of Applications and Proceedings in the United States Patent and Trademark Office, U.S. Patent & Trademark Office (Oct. 2015), <https://www.uspto.gov/patents-getting-started/general-information-concerning-patents#heading-19> [<https://perma.cc/BLX3-XB8H>] (describing current practice); see also Sluby, *Inventive Spirit*, *supra* note 65, at xxxii–xxxiii.

75. Henry E. Baker Biography, *supra* note 31.

movement in this city . . . looking to the betterment of the condition of his race.”<sup>76</sup> Baker used his position in the patent office to support these movements by identifying as many African Americans as possible who overcame barriers to patent inventions.

This self-imposed task was not simple. Successful patent applicants did not leave paper trails like the one Oscar had created.<sup>77</sup> And the patent office records did not mention the race of inventors, with one exception: In 1834 and 1836, in the lists of granted patents, Baker found that the office had designated patentee Henry Blair of Maryland as “colored.”<sup>78</sup> Unable to find in the records any other “hint whatever that of the thousands of mechanical inventions for which patents [were] granted annually by the government, any patent ha[d] ever been granted to a Negro,” Baker turned to memory.<sup>79</sup> Baker attempted to contact those who might have information about black inventors: He asked patent office employees and patent agents and attorneys to share any information they could recall about black inventors and patentees, matching their remembrances to the official records.<sup>80</sup>

By 1886, he had identified forty-five patents granted to African Americans.<sup>81</sup> Slowly, Baker added to his list, and as he did so, the list circulated among other African Americans seeking “the betterment of the condition of [the] race.”<sup>82</sup> For example, Representative George Washington Murray, the sole African American in Congress in 1894 and himself both formerly enslaved and a patentee,<sup>83</sup> inserted the list into the congressional record.<sup>84</sup> He did so in support of his speech advocating federal funding for the Atlanta Cotton States Exposition of 1895, arguing that American blacks deserved the chance to display their inventive accomplishments to white America as a means of overturning racial stereotypes and helping

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76. *Id.*

77. See *supra* notes 35–36 and accompanying text.

78. Baker, *The Negro as an Inventor*, *supra* note 32, at 399–400.

79. *Id.* at 399. Baker later noted that patent office records could easily be used to identify how many U.S. patents had been granted to English, French, German, or Italian citizens, but not those granted to African Americans. Baker, *The Colored Inventor*, *supra* note 29, at 4. But see Wills, *supra* note 62, at 218 (erroneously claiming Baker stated that other countries collected information on the racial categorization of patentees).

80. Henry E. Baker, Letter to the Editor, *Colored Inventors*, *Wash. Bee*, Apr. 27, 1889 [hereinafter Baker, *Colored Inventors*], [https://chroniclingamerica.loc.gov/data/batches/dlc\\_grover\\_ver01/data/sn84025891/00211102925/1889042701/0646.pdf](https://chroniclingamerica.loc.gov/data/batches/dlc_grover_ver01/data/sn84025891/00211102925/1889042701/0646.pdf) [<https://perma.cc/BJ2K-4CK6>] (describing Baker’s means of identifying black patentees and providing a list of thirty-five).

81. See R.R. Wright, *The Negro as an Inventor*, 2 *Afr. Methodist Episcopal Church Rev.* 397, 409–10 (1886) (printing Baker’s list).

82. Henry E. Baker Biography, *supra* note 31.

83. John F. Marszalek, *A Black Congressman in the Age of Jim Crow: South Carolina’s George Washington Murray* 3, 51, 123 (2006).

84. *A Partial List of Patents Granted by the United States for Inventions by Afro-Americans*, 26 *Cong. Rec.* 8382–83 (1894).

white Americans “appreciate the fact that the colored man is entitled to a share in the government of the country.”<sup>85</sup>

In 1902, Baker published his list as it then existed in an ambitious volume, *Twentieth Century Negro Literature; or, A Cyclopedia of Thought on the Vital Topics Relating to the American Negro by One Hundred of America's Greatest Negroes*.<sup>86</sup> Its editor, Dr. Daniel W. Culp, dedicated his book “to all persons of whatever race” interested in the “elevation of the Negro,” “with the ardent hope” that before the twentieth century ended “the Negro . . . shall reach that point in the American civilization, where he will be recognized and treated as any other American citizen.”<sup>87</sup> Culp, an African American physician, knew well that despite the Reconstruction Amendments, the African American was not “treated as any other American citizen.”<sup>88</sup> At the turn of the twentieth century, in what historian Rayford Logan has called the “nadir” of American race relations, African Americans faced disenfranchisement, broad exclusion from all aspects of government, employment discrimination, segregation, and an epidemic of lynching.<sup>89</sup> To reach his objective, Culp sought to “enlighten the uninformed white people on the intellectual ability of the Negro.”<sup>90</sup>

Baker contributed both his list and an accompanying essay, *The Negro as an Inventor*.<sup>91</sup> Baker explained how his ongoing project supported the commitment he shared with Culp and other activists to racial betterment and the quest for full citizenship. “[A]n individual,” he argued, “is measured by the contribution he makes to the well[-]being of the community in which he lives.”<sup>92</sup> The community of African Americans was the United States, and the United States, Baker claimed, was “at the front rank of the enlightened nations of the world” because of the “inventive skill” of its people.<sup>93</sup> To be “measured” as equals and treated like “other American citizen[s],”<sup>94</sup> African Americans needed to show their contribution “to the inventive skill of this country.”<sup>95</sup> Hence the list, making at least partially visible what the patent office had long allowed to remain obscure.

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85. Id. For an example of Baker’s list publicized by an African American activist, see Wright, *supra* note 81, at 409–10, and in an African American newspaper, see Baker, *Colored Inventors*, *supra* note 80.

86. Baker, *The Negro as an Inventor*, *supra* note 32, at 405–13.

87. D.W. Culp, Title Page & Dedication, *in* *Twentieth Century Negro Literature*, *supra* note 31 [hereinafter Culp, Dedication] (unpaginated dedication).

88. Id.

89. See Rayford W. Logan, *The Negro in American Life and Thought: The Nadir, 1877–1901*, at 11, 52 (1954).

90. D.W. Culp, Preface, *in* *Twentieth Century Negro Literature*, *supra* note 31, at 5.

91. Baker, *The Negro as an Inventor*, *supra* note 32, at 399–405.

92. Id. at 399.

93. Id.

94. Culp, Dedication, *supra* note 87.

95. Baker, *The Negro as an Inventor*, *supra* note 32, at 399.

As he did in his later pamphlet, Baker sought to make readers, both white and black, remember *Invention of a Slave*.<sup>96</sup> Baker realized that his dependence on memory allowed him to identify only recent African American patentees.<sup>97</sup> Aside from the two patents granted to “colored” inventor Blair, his list in 1902 contained only one patent from the antebellum period.<sup>98</sup> He told his readers that it was impossible to identify “many hundreds of valuable inventions . . . patented by Negro inventors.”<sup>99</sup> Further, he explained that enslaved inventors like Ned were not on his list, since “the government seemed committed to the theory that ‘a slave could not take out a patent for his invention.’”<sup>100</sup> Baker referred his readers to the volume and page within the “Opinions of the Attorneys-General, United States” so that they could read *Invention of a Slave* themselves.<sup>101</sup> *Invention of a Slave* might be unread by lawyers, but the African American community and its white allies were encouraged to take a look if they needed further proof to understand why so few African Americans had patented inventions before Reconstruction.

Baker’s only stand-alone publication, an updated version of the essay he had published in Culp’s volume, was the pamphlet printed and advertised by the NAACP.<sup>102</sup> W.E.B. Du Bois, already a national leader for African American rights and an NAACP founder, was Director of Research and Publications in 1913, editing the organization’s magazine, *The Crisis*.<sup>103</sup> Trained as a historian and committed to using NAACP publications to support “earnest and persistent attempts to gain . . . rights,”<sup>104</sup> Du Bois believed in using history as a weapon, fighting against “white distortion” of the past and empowering African Americans by preserving their historical memory.<sup>105</sup> Like Culp and Baker,<sup>106</sup> Du Bois believed that the push for civil rights would be aided by remembering African American inventors and

96. See *id.* at 400 (citing *Invention of a Slave*, 9 Op. Att’y Gen. 171 (1858)).

97. Baker, *The Colored Inventor*, *supra* note 29, at 4.

98. Baker, *The Negro as an Inventor*, *supra* note 32, at 407 (listing a patent for a grid-iron issued in 1845).

99. *Id.* at 401.

100. *Id.* at 400.

101. *Id.* (citing *Invention of a Slave*, 9 Op. Att’y Gen. 171).

102. *The Crisis* included a list of NAACP publications for sale, including *The Colored Inventor*. See, e.g., Suitable Gift Books, *Crisis*, Dec. 1913 (unpaginated advertisement), <https://repository.library.brown.edu/studio/item/bdr:517675/PDF> [<https://perma.cc/TAZ9-WJ2X>].

103. Shawn Leigh Alexander, Introduction to Protest and Propaganda: W.E.B. Du Bois, *The Crisis*, and American History 1, 2 (Amy Helene Kirschke & Phillip Luke Sinitiere eds., 2014); Gerald Horne, Preface to Protest and Propaganda: W.E.B. Du Bois, *The Crisis*, and American History, *supra*, at ix.

104. Alexander, *supra* note 103, at 2–3 (quoting W.E.B. Du Bois, *Crisis*, Nov. 1910, at 10).

105. Amy Helene Kirschke & Phillip Luke Sinitiere, W.E.B. Du Bois as Print Propagandist, in Protest and Propaganda: W.E.B. Du Bois, *The Crisis*, and American History, *supra* note 103, at 36–37.

106. Cf. Baker, *The Colored Inventor*, *supra* note 29, at 4 (noting the legal bar to patents on inventions of slaves).

the inventiveness of enslaved persons, like Ned, whose inventions had gone unpatented.

Carter Woodson agreed. Woodson, who was the second African American (following Du Bois) to obtain a doctorate in history from Harvard University, formed the Association for the Study of Negro Life and History in 1915, and in 1916 launched the Association's *Journal of Negro History*.<sup>107</sup> The *Journal* was intended to promote scholarship on African American history, thereby addressing the exclusion of the African American experience and perspective from U.S. history and providing a forum to publish scholarship contrary to the dominant historiography of the early twentieth century, which blamed African Americans for the failure of Reconstruction.<sup>108</sup> In 1917, Woodson published an article by Baker on African American inventors in the second volume of the *Journal*.<sup>109</sup> In this scholarly forum, Baker again referenced *Invention of a Slave* with full citation information, keeping its memory alive in the growing community of those writing African American history.<sup>110</sup>

Even those who disagreed with the strategy and tactics of the NAACP agreed that remembering *Invention of a Slave* should be part of African American advocacy. Booker T. Washington, another national African American leader, was known for a conciliatory, gradualist approach to African American civil rights, advocating self-help for African Americans through industrial education and small business development, and disavowing public demands for equality.<sup>111</sup> To advance his goals, Washington founded the Tuskegee Institute (now Tuskegee University) in 1881 to educate African Americans and remained its principal until his death in

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107. See Korey Bowers Brown, Carter G. Woodson, Ass'n for the Study of African Am. History, <https://asalh.org/about-us/our-history> [<https://perma.cc/8KNZ-2PB6>] (last visited Jan. 25, 2020). The association is now called the Association for the Study of African American Life and History, and the journal is now the *Journal of African American History*. See id.; Journal of African American History, Ass'n for the Study of African Am. History, <https://asalh.org/document/journal-of-african-american-history> [<https://perma.cc/3HB7-Q2GB>] (last visited Jan. 31, 2020).

108. Jacqueline Goggin, Countering White Racist Scholarship: Carter G. Woodson and *The Journal of Negro History*, 68 J. Negro Hist. 355, 358–60 (1983). Woodson was also deliberately using history writing to create a shared African American memory, part of community building. See Pero Gaglo Dagbovie, The Early Black History Movement, Carter G. Woodson, and Lorenzo Johnston Greene 3 (2007); Jacqueline Goggin, Carter G. Woodson: A Life in Black History 33 (1993); August Meier & Elliott Rudwick, Black History and the Historical Profession, 1915–1980, at 1–71 (1986).

109. Baker, Negro in the Field of Invention, *supra* note 60.

110. Id. at 24 & n.2.

111. Washington and Du Bois disagreed about both strategy and tactics, and the NAACP was founded in part because of Du Bois's opposition to Washington's racial politics. See Robert J. Norrell, Up from History: The Life of Booker T. Washington 224–33, 387–92 (2009); Sullivan, *supra* note 30, at 2–4, 7; Mabel O. Wilson, Negro Building: Black Americans in the World of Fairs and Museums 40–42, 88, 138–39 (2012).

1915.<sup>112</sup> Washington included the story of *Invention of a Slave* in his popular African American history series, *The Story of the Negro*.<sup>113</sup> Further, under his guidance, the *Negro Year Book* kept *Invention of a Slave* within the curated memory of African Americans. Tuskegee began publishing the *Negro Year Book* in 1912, employing African American sociologist Monroe Work as its first editor.<sup>114</sup> The *Year Book*—intended to be an “[e]ncyclopedia” providing up-to-date information about all areas of African American life—could be found on classroom shelves and in homes, and became “the standard book of reference” on race relations for many social scientists.<sup>115</sup>

In the first eight editions, readers could learn that in 1858, the Attorney General of the United States ruled that an enslaved inventor could not receive a patent.<sup>116</sup> In several editions, the editor reprinted the full text of Massachusetts Senator Charles Sumner’s resolution in 1861 urging Congress to amend the law to clarify the right of African Americans to secure patents.<sup>117</sup> In the 1920s, the editor also added the text of the Confederate patent law that specifically allowed enslavers to patent the inventions of their slaves.<sup>118</sup> Work also invited readers to contribute to

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112. Louis R. Harlan, Booker T. Washington: The Wizard of Tuskegee, 1901–1915, at vii (1983).

113. See Booker T. Washington, 2 *The Story of the Negro: The Rise of the Race from Slavery* 77–78 (Doubleday, Doran & Co., Inc. 1940) (1909).

114. Norrell, *supra* note 111, at 371; Mark Tucker, “You Can’t Argue with Facts”: Monroe Nathan Work as Information Officer, Editor, and Bibliographer, 26 *Libr. & Culture* 151, 162 (1991).

115. Tucker, *supra* note 114, at 162–63. The full title was the *Negro Year Book and Annual Encyclopedia of the Negro*. *Id.* at 162. For a description of the 1952 edition, see generally Ann L. Collins, 1952 *Negro Year Book*, 22 *J. Negro Educ.* 500 (1953) (book review). *The Crisis* was one of the few publications that reviewed the *Year Book* somewhat critically. Tucker, *supra* note 114, at 162–63.

116. *Negro Year Book* 1911–1912, at 164 (Monroe N. Work ed., 1912); *Negro Year Book* 1913, at 207 (Monroe N. Work ed., 1913); *Negro Year Book* 1914–1915, at 283 (Monroe N. Work ed., 1914); *Negro Year Book* 1916–1917, at 301 (Monroe N. Work ed., 1916); *Negro Year Book* 1918–1919, at 342 (Monroe N. Work ed., 1919); *Negro Year Book* 1921–1922, at 317–18 (Monroe N. Work ed., 1922); *Negro Year Book* 1925–1926, at 366 (Monroe N. Work ed., 1925); *Negro Year Book* 1931–1932, at 166–67 (Monroe N. Work ed., 1931). Despite its name, the *Negro Year Book* was not published annually. Work edited the first nine of eleven editions between 1912 and 1937. See Linda O. McMurry, *Recorder of the Black Experience: A Biography of Monroe Nathan Work* 76 (1985); Tucker, *supra* note 114, at 162–63. Jessie Parker Guzman edited two more editions, published in 1947 and 1952. Jessie Carney Smith, Jessie P. Guzman, in *Notable Black American Women: Book II* 266, 267 (Jessie Carney Smith ed., 1996).

117. *Negro Year Book* 1914–1915, *supra* note 116, at 283; *Negro Year Book* 1916–1917, *supra* note 116, at 301; *Negro Year Book* 1918–1919, *supra* note 116, at 342; *Negro Year Book* 1921–1922, *supra* note 116, at 318; *Negro Year Book* 1931–1932, *supra* note 116, at 166 (all mistakenly referencing Sumner as “Summer”).

118. *Negro Year Book* 1921–1922, *supra* note 116, at 317–18; *Negro Year Book* 1925–1926, *supra* note 116, at 366; *Negro Year Book* 1931–1932, *supra* note 116, at 166. Baker had provided the text of this statute together with full citation information. Baker, *Negro in the Field of Invention*, *supra* note 60, at 24.

Baker's project by sending him information on African American inventors, and, in later editions, the *Year Book* continued to publish lists of recent African American inventors.<sup>119</sup>

If students failed to encounter *Invention of a Slave* in the *Year Book*, they might find it in their high school history text. The same year the NAACP published Baker's pamphlet, Benjamin Brawley, dean and professor of English at Atlanta Baptist College (now Morehouse College), published the first edition of *A Short History of the American Negro*.<sup>120</sup> He relied on Henry Baker for evidence of "Negro Achievement" in invention, informing countless students about "the queer situation" of inventions by enslaved persons, unpatentable by either master or inventor.<sup>121</sup> Brawley published four editions of his history and the fourth edition remained in use as a textbook into the 1950s.<sup>122</sup> Woodson, too, in his co-authored high school text, *The Story of the Negro Retold*, referenced Baker when describing "evidence that some of the inventions brought out by white persons in the South prior to the Civil War were devices invented by Negroes" and when describing Jeremiah's 1858 opinion.<sup>123</sup>

Whether Americans, white or black, preferred to support the message of self-sufficiency of the Tuskegee Institute or the more activist policies of the NAACP, they were given repeated opportunities throughout the first half of the twentieth century to learn about *Invention of a Slave*. This cascade of publications that continued long after Baker's death kept Ned and other African American inventors within a collective African American memory. During decades when lawyers never read, cited, or studied *Invention of a Slave*, high school or college students encountered it in segregated classrooms and libraries. Teachers and parents read about it in the *Negro Year Book* or the *Negro History Bulletin*, another Woodson publication dedicated to engaging, easy-to-read articles about African American history for educators and the black working class.<sup>124</sup> Those working in black history learned about it in the *Journal of Negro History*. Those researching

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119. *Negro Year Book* 1914–1915, supra note 116 (unpaginated publisher's introduction); *Negro Year Book* 1937–1938, at 12–14 (Monroe M. Work ed., 1937) (listing inventions from 1932–35); *Negro Year Book* 1941–1946, at 26–31 (Jessie Parkhurst Guzman ed., 1947) (listing inventions from 1936–46).

120. Benjamin Griffith Brawley, *A Short History of the American Negro* (1913). The scope and content of the book is described in a review of the final edition by E. Franklin Frazier, a prominent African American sociologist. E. Franklin Frazier, *A Short History of the American Negro*, 46 *Am. J. Soc.* 766 (1941) (book review). For Brawley's life, see John W. Parker, *Phylon Profile*, XIX: Benjamin Brawley—Teacher and Scholar, 10 *Phylon* 15, 15–24 (1949).

121. See Brawley, supra note 120, at vii–ix, 230.

122. Benjamin Griffith Brawley, *A Short History of the American Negro* (4th ed. 1939) (11th prt. 1952).

123. Carter G. Woodson & Charles H. Wesley, *The Story of the Negro Retold*, 104–05 & n.1 (4th ed. 1959) (previous editions published in 1935, 1942, and 1945).

124. Dagbovie, supra note 108, at 4; *The American Negro as an Inventor*, 3 *Negro Hist. Bull.* 83, 83 (1940).

the status of African Americans and race relations found it in the pages of the *Negro Year Book*.<sup>125</sup>

Baker had begun this process as a man profoundly shaped by the racial politics of the Civil War and Reconstruction and committed to the improvement of the status of African Americans. Those who publicized his work shared the goal Culp had articulated in 1902: to build a nation in which the African American was “recognized and treated as any other American citizen.”<sup>126</sup> They were remembering a legal story in support of legal change.<sup>127</sup>

#### B. *In the Civil Rights Era*

Those interested in African American invention in the late twentieth century were not limited to crumbling original copies of Baker’s pamphlet. In 1969, it was reprinted as part of a series to recover and preserve African American history and literature.<sup>128</sup> Just as Jeremiah’s opinion had been remembered by activists seeking change during the height of Jim Crow violence, those who continued to work for inclusion in the context of the post-World War II civil rights movement also understood that remembering Ned and Oscar remained a political act. Like Baker, the women and men who researched and wrote about Ned and other African American inventors did so in the context of their own experiences as pioneers in their fields, drawing upon their personal knowledge of the civil rights movement, black nationalism, affirmative action, and new laws to combat de jure and de facto discrimination.

Black inventor McKinley Burt, Jr., a man dedicated to promoting black entrepreneurship and education, published his own pamphlet in 1969, geared toward students: *Black Inventors of America*.<sup>129</sup> Burt reprinted Baker’s list and his reminder that enslaved persons had been prohibited

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125. See Tucker, *supra* note 114, at 162–63 (describing how scholars relied on the *Negro Year Book* as a source of information).

126. Culp, *Dedication*, *supra* note 87.

127. This remembering can also be understood as part of the politics of racial uplift, a complicated strand in African American activism and intellectual history that has been critically examined by historian Kevin K. Gaines. Kevin Kelly Gaines, *Uplifting the Race: Black Leadership, Politics, and Culture in the Twentieth Century*, at xiv–xv (1996) (explaining objectives of the book); see also Brittany Cooper, *Beyond Respectability: The Intellectual Thought of Race Women* 26 (2017) (noting the use of “listing” to create “intellectual, political, and/or cultural legitimacy”).

128. Baker, *The Colored Inventor*, *supra* note 29, reprinted in *The American Negro: His History and Literature* (Arno Press 1969); see also Arthur L. Smith, *Review Essay*, 3 *J. Black Stud.* 117, 117–19 (1972) (reviewing *The American Negro: His History and Literature*). In the twenty-first century, the pamphlet’s accessibility has been broadened through digitization: <https://babel.hathitrust.org/cgi/pt?id=emu.010000667530&view=1up&seq=1>.

129. McKinley Burt, Jr., *Black Inventors of America* 7 (1969) (republished in 1989 under the title *The Black Inventor in America*).

from receiving patents.<sup>130</sup> He wanted students to think about black inventors in the context of “black capitalism,” approvingly describing current efforts to create black-owned businesses as a form of “Black power” and setting them in the context of slavery, Reconstruction, and the virulent backlash against African Americans that had pushed them out of skilled trades.<sup>131</sup> For Burt and his intended readers, remembering *Invention of a Slave* was a reminder of past barriers and present potential for the commercialization of invention.

Just as the NAACP and Tuskegee had incorporated reminders of Ned and black inventors into their activism, so did African American organizations of this era. The Institute for Positive Education, a nonprofit community service organization founded in 1969 to promote African-centered education, published a pamphlet, *Black Inventors*, in 1975.<sup>132</sup> Its author, pioneering African American anthropologist Dr. Irene Diggs, Morgan State College professor and former research assistant to Du Bois, relied on those earlier publications about *Invention of a Slave* and black inventors to tell Ned’s story and republish Baker’s list.<sup>133</sup> In retelling that history for a new generation, she used the strategy I echo here, providing the details of Baker’s life and his struggles to uncover these forgotten inventors when attorneys “regard[ed] the whole subject as a joke.”<sup>134</sup> Ned’s story had been so forgotten in law that the very idea of an African American inventor could seem laughable to some patent attorneys Baker contacted to ask for help in identifying black patentees.

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130. *Id.* at 2, 5, 136–48.

131. *Id.* at 117–22. The term “black capitalism” has a complex history that included, for example, both rejection and embrace by leaders of the Black Panther Party in the late 1960s and 1970s. Robert E. Weems, Jr. & Lewis A. Randolph, *Business in Black and White: American Presidents & Black Entrepreneurs in the Twentieth Century* 154–55 (2009). The Black Power movement of that period also had a complicated relationship to capitalism. Ashley D. Farmer, *Remaking Black Power: How Black Women Transformed an Era* 9 (2017) (noting that “the Black Power movement of the late 1960s and 1970s was widespread and multifaceted” and included exponents of socialism as well as of capitalism).

132. Irene Diggs, *Black Inventors* (1975). For more about the Institute of Positive Education, see generally Carol D. Lee, *Profile of an Independent Black Institution: African-Centered Education at Work*, 61 *J. Negro Educ.* 160, 162 (1992); Haki Madhubuti, *Storm Coming: Memoir and History (Reminiscence)*, in *SOS—Calling All Black People: A Black Arts Movement Reader* 254, 261–62 (John H. Bracey Jr., Sonia Sanchez & James Smethurst eds., 2014) (describing the work of the Institute for Positive Education in the 1970s in the context of Black national and African liberation movements); D.H. Melhem, Haki R. Madhubuti: *Prescriptive Revolution*, in *Heroism in the New Black Poetry: Introductions and Interviews* 85–131 (1990); *About Us*, Inst. of Positive Educ., <http://www.ipeclc.org/about.html> [<https://perma.cc/B5QX-Q4PD>] (last visited Jan. 31, 2020).

133. Diggs, *supra* note 132, at 2–3, 6–14, 15, 17–19 (citing Baker, Wright, and Du Bois); see also A. Lynn Bolles, Ellen Irene Diggs: *Coming of Age in Atlanta, Havana, and Baltimore*, in *African-American Pioneers in Anthropology* 154, 154–167 (Ira E. Harrison & Faye V. Harrison eds., 1999).

134. Diggs, *supra* note 132, at 4, 19 n.13 (referencing reactions of some patent attorneys to Baker’s request for information on African American inventors).

In these same decades, such popular sources, designed to reach students and general audiences, were supplemented by scholarly writing within the African American history community created by Woodson. Dr. Dorothy Cowser Yancy began writing about *Invention of a Slave* as one of the few African American faculty members at the historically white Georgia Institute of Technology (later becoming the first tenured African American full professor at the institution).<sup>135</sup> Yancy had grown up in segregated Alabama, and in the early 1960s, as a college student at the historically black Johnson C. Smith University in Charlotte, North Carolina, she had joined sit-in protests against racial segregation.<sup>136</sup> She described the “Stuart Double Plow” in the *Negro History Bulletin* in 1976 as part of an article profiling four more recent African American patentees.<sup>137</sup> Researching African American inventors of the twentieth century was no easier than it had been in the nineteenth century. Yancy found it “a tedious and time-consuming task” to uncover these hidden accomplishments.<sup>138</sup> Like Baker, however, Yancy found the effort worthwhile, publishing about African American inventors in multiple venues, focusing on keeping the story of Ned and others within the collective memory of African Americans. In addition to the *Negro History Bulletin* article, she contributed a survey of twentieth-century black patentees to a National Afro-American History Kit,<sup>139</sup> a project designed to support educators with classroom content for Black History Month.<sup>140</sup> In 1984, she also authored an academic article in the *Journal of Negro History* about Ned’s invention, using primary sources from Mississippi archives to provide more details than had Baker

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135. See Dorothy Cowser Yancy: Biography, The HistoryMakers, <http://www.thehistorymakers.org/biography/dorothy-cowser-yancy-41> [<https://perma.cc/35SX-TUGM>] (last visited Jan. 25, 2020).

136. In subsequent decades, Yancy published in many other areas of African American studies and became the first African American woman to lead two different universities, her alma mater Johnson C. Smith and Shaw University. See Monika Rhue, The Inez Moore Parker Archives & Research Ctr., Finding Aid 2 (2000), <https://docs.google.com/document/d/1QwRDSar0OWfv8ALRbl6Jnvety0ghqIwvmhJYVxpuHg/edit> (on file with the *Columbia Law Review*) (offering a historical note on Yancy); Dorothy Cowser Yancy: Biography, *supra* note 135; The Yancy Years, Shaw Univ., [https://www.shawu.edu/The\\_Yancy\\_Years.aspx](https://www.shawu.edu/The_Yancy_Years.aspx) [<https://perma.cc/9EYJ-PVRV>] (last visited Feb. 22, 2020).

137. Dorothy Cowser Yancy, Four Black Inventors with Patents, 39 *Negro Hist. Bull.* 574, 574 & n.4 (1976).

138. *Id.* In addition to relying on Burt’s book, Yancy also cited Baker. *Id.* at 576 & nn.2–3 & 6–11 (mistakenly identifying Baker as “Blair”).

139. See Patricia Carter Ives, Patent and Trademark Innovations of Black Americans and Women, 62 *J. Pat. Off. Soc’y* 108, app. at 117 (1980) [hereinafter Ives, Patent and Trademark Innovations] (citing Dorothy Cowser Yancy, Twentieth Century Patentees—A Survey, *in* National Afro-American History Kit (J.R. Picott ed., 1979)). Materials related to black inventors were included in the Afro-American History Kit in more than one year. See Ives, Patent and Trademark Innovations, *supra*, app. at 117 (citing *The Black Man in Inventions and Discoveries: Gifts to American Everyday Life*, *in* History Kit of the Association for the Study of Afro-American Life & History (J. Rupert Picott ed., 1977)).

140. Carol F. Karpinski, J. Rupert Picott, *in* Encyclopedia of Educational Leadership and Administration 761 (Fenwick W. English ed., 2006).

about Ned's double plow, Oscar's attempt to patent and commercialize it, and Jeremiah's opinion.<sup>141</sup>

While Yancy expanded Ned's story for popular and academic audiences in African American history, and Burt and Diggs referenced it while introducing new audiences to Baker's list, Patricia Carter Sluby has done more than anyone since Baker to continue his project of identifying all African American patentees. Since the 1980s, Sluby has collected and distributed information about individual African American inventors, both patentees and those, like Ned, who were unable to obtain a patent. An African American chemist turned patent examiner, Sluby was driven to learn about inventors who looked like herself, much like Baker had been one hundred years earlier when he joined the patent office.<sup>142</sup> Sluby has published three books on African American patentees, in addition to numerous articles in many venues.<sup>143</sup> Through these publications, Sluby continued the remembering of *Invention of a Slave*, discussing the details of Ned's invention and Oscar's controversial application, and reprinting the entire text of the opinion.<sup>144</sup> If Baker is the "Father of Black Inventor Research,"<sup>145</sup> Sluby is its mother.

Although much of her writing has been motivated by the goal of having the "*world at large* learn of African American problem solvers who beat the odds and turn obstacles into opportunities," Sluby's article, *Patent and Trademark Innovations of Black Americans and Women*, accomplished something different.<sup>146</sup> She published it in 1980 in the *Journal of the Patent Office Society*, bringing these stories into the majority-white world of legal publishing and the searchable databases of legal memory.<sup>147</sup> This journal, begun in 1918, was designed as a forum for communication about the patent system for employees of the patent office and interested others, such as the

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141. Yancy, Stuart Double Plow, *supra* note 35, at 48–51. Excerpts from the Quitman letter had previously been published in Moore, *supra* note 63, at 187–89 (publishing two testimonials from the Mississippi archives).

142. Sluby, *Inventive Spirit*, *supra* note 65, at xxvii, xxxi.

143. Patricia Carter Sluby, *Creativity and Inventions: The Genius of Afro-Americans and Women in the United States and Their Patents* (1987); Patricia Carter Sluby, *The Entrepreneurial Spirit of African American Inventors* (2011); Sluby, *Inventive Spirit*, *supra* note 65; Patricia Carter Sluby, African American Brilliance, 46 *Tar Heel Junior Historian*, Fall 2006, at 1, 1–2; Patricia Sluby, MiSciNet Shero—Patricia Carter Ives Sluby, *Science* (May 24, 2002), <https://www.sciencemag.org/careers/2002/05/miscinet-shero-patricia-carter-ives-sluby> [<https://perma.cc/F836-C5D8>].

144. Sluby, *Inventive Spirit*, *supra* note 65, at 31–32.

145. Holmes, *supra* note 64, at 14.

146. Ives, *Patent and Trademark Innovations*, *supra* note 139; E-mail from Patricia Sluby to author (Feb. 25, 2019) (emphasis in original) (on file with the *Columbia Law Review*).

147. Under its current title, the *Journal of the Patent and Trademark Society*, the *Journal* is included in legal databases, with issues from the last few decades searchable and accessible by legal practitioners. Back issues are available on Westlaw from 1994; the full run of the *Journal* is available on HeinOnline.

patent bar.<sup>148</sup> Through its pages, Sluby informed an audience of lawyers, inventors, and patent examiners about the accomplishments of African Americans and women by making what was invisible in office records—that is, race and sex—visible. She included updated lists of African American and women inventors and provided a bibliography that directed readers to the writings of Baker, Burt, and Yancy, among others.<sup>149</sup> Further, Sluby introduced her readers to the long tradition of remembering black inventors in the context of enslaved inventors like Ned by explaining *Invention of a Slave*.<sup>150</sup> Although the *Journal*, from its first issue, published numerous articles about patent history, it never published Baker's work while he was employed in the patent office and had largely ignored African American inventors and *Invention of a Slave*.<sup>151</sup>

While Sluby was introducing the late-twentieth-century patent office to the work of its former employee, Portia James was doing the same with respect to Baker's other community, the African American population of Washington, D.C. James made Ned and other African American inventors visible in a new way, through a museum exhibition. James was a historian and curator at the Anacostia Community Museum in Washington, D.C., an addition to the Smithsonian Institute in 1967 that itself was a response to civil rights activism as part of the national African American museum

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148. Editorial, 1 J. Pat. Off. Soc'y 1, 1–2 (1918). For a description of the Patent Office Society at its founding, see The Patent Office Society, 1 J. Pat. Off. Soc'y 3, 3–5 (1918).

149. Ives, Patent and Trademark Innovations, *supra* note 139, app. at 117–23.

150. *Id.* at 110.

151. See generally, e.g., P.J. Federico, Outline of the History of the United States Patent Office (1936) (reprinting some of the many historical essays first published in the *Journal*); Wm. I. Wyman, Thomas Jefferson and the Patent System, 1 J. Pat. Off. Soc'y 5 (1918) (discussing, in the journal's first issue, the history of Thomas Jefferson's involvement in the patent system). For examples of failure to mention African American inventors or the opinion, see generally Jane Elizabeth Newton, A Forgotten Chapter of Confederate History, 12 J. Pat. Off. Soc'y 248 (1930) (omitting any mention that the Confederacy, in response to *Invention of a Slave*, had provided for the ability of enslavers to patent inventions of enslaved persons they owned); Max W. Tucker, The Patent Office of the Confederacy, 3 J. Pat. Off. Soc'y 296 (1920) (same). Baker's writing was not published in the *Journal of the Patent Office Society* until after his death, when a white patent examiner reprinted long excerpts from Baker's work. See Joseph Rossman, The Negro Inventor, 12 J. Pat. Off. Soc'y 549, 551–53 (1930) (citing Baker, The Negro as an Inventor, *supra* note 32). Before Sluby's article, the sole mention of Ned in the pages of the *Journal* was by John C. Boyle in 1960. See Boyle, Patents and Civil Rights, *supra* note 36, at 789–94. Boyle, a white lawyer, began his career as a patent examiner from 1903 to 1919, when Baker was also working as a patent examiner. See John Boyle, Long Delay in Granting Patents, 46 J. Pat. Off. Soc'y 175, 175 n.\* (1964) (biographical footnote); Obituary, John Boyle, Government Lawyer, 93, Wash. Post, June 2, 1971, at C4; Draft Registration Card for John Boyle, Jr., Sept. 6, 191X (date incomplete) (giving race and occupation) (on file with the *Columbia Law Review*). His article was a combination of transcription and summary of Oscar's correspondence with the Secretary of the Interior. The article is frustratingly silent on what caused Boyle to turn to this topic as a white lawyer working in Washington, D.C. during the civil rights movement, leaving only its title to suggest a connection between the content of the letters he transcribed and the racial politics of 1960.

movement.<sup>152</sup> In 1989, James curated an exhibition entitled “The Real McCoy: African-American Invention and Innovation, 1619–1930” and authored the accompanying catalogue.<sup>153</sup> In both the exhibition and the catalogue, James told the public about Ned, his plow, and Oscar’s fruitless quest to patent it, a story sufficiently intriguing to earn mention in a review of the exhibition published in Los Angeles.<sup>154</sup> The text of *Invention of a Slave* was made into an artifact, taken from the pages of law books and reproduced in the exhibition catalogue, along with a printed advertisement for the double cotton scraper and double plow as manufactured by Oscar.<sup>155</sup>

Through popular accounts, public history, exhibits, educational efforts, and traditional scholarship, *Invention of a Slave* was remembered in every decade of the twentieth century and, in the twenty-first century, has continued to be.<sup>156</sup> Because of persistent efforts by those dedicated to the “betterment of [their] race,”<sup>157</sup> it is not, and never has been, a forgotten

152. See Wilson, *supra* note 111, at 245–97, 307–10; History, Smithsonian Anacostia Cmty. Museum, <http://anacostia.si.edu/About/History> [<https://perma.cc/6VAV-FBU3>] (last visited Jan. 31, 2020) (describing the history of the museum); The Smithsonian Anacostia Cmty. Museum Has Lost One of Its Own: Portia James, Senior Curator, Smithsonian Anacostia Community Museum, [http://anacostia.si.edu/Content/img/Home/Portia\\_James.pdf](http://anacostia.si.edu/Content/img/Home/Portia_James.pdf) [<https://perma.cc/2529-4ZDF>] (last visited Jan. 31, 2020) (documenting James’s curatorial career). The African American museum movement eventually led to the opening of the National Museum of African American History and Culture in 2016. See About the Museum, Smithsonian Nat’l Museum of Afr. Am. Hist. & Culture, <https://nmaahc.si.edu/about/museum> [<https://perma.cc/4JGK-YXWY>] (last visited Jan. 31, 2020).

153. James, *The Real McCoy*, *supra* note 36. James also relied on personal assistance from Sluby. *Id.* at 7.

154. *Id.* at 48–49; Exhibit Fetes Genius of America’s Black Inventors, *L.A. Sentinel*, May 25, 1989, at A4.

155. James, *The Real McCoy*, *supra* note 36, at 50–51. James also contributed an essay discussing Ned and other African American inventors to an edited scholarly collection. Portia James, “To Collect Proof of Colored Talent and Ingenuity”: African American Invention and Innovation, 1619–1930, *in* *Technology and the African-American Experience: Needs and Opportunities for Study* 49, 50–51 (Bruce Sinclair ed., 2004) [hereinafter James, *To Collect Proof*]. This edited collection followed the first book-length academic investigation of African American inventors, which also used Baker’s publications and *Invention of a Slave* to place African American inventors within the history of African Americans seeking to be treated like every other American citizen. Fouché, *supra* note 65, 11–12, 192.

156. In addition to the writers discussed in this Essay, others have joined the project of memorializing African American inventors. See generally, e.g., C.R. Gibbs, *Black Inventors: From Africa to America, Two Million Years of Invention and Innovation* (1995) (chronicling ancient African inventions and offering a history of African American invention through the twentieth century); Louis Haber, *Black Pioneers of Science and Invention* (rev. ed. 1992) (offering biographies of fourteen African American scientists, inventors, and physicians); Holmes, *supra* note 64 (surveying inventions and trademarks by inventors from the African diaspora, including those in the United States); Ives, *Patent and Trademark Innovations*, *supra* note 139, app. at 117–19 (listing publications about black inventors); Sluby, *Inventive Spirit*, *supra* note 65 (profiling African American inventors beginning before the Emancipation Proclamation through the post–World War II period).

157. Henry E. Baker Biography, *supra* note 31.

opinion or a lost story. To encounter it as if it were, as I did, is the result of blindness, a failure to see one of law's stories because of the places in which it was told and the people who were telling it.

### III. THE STAKES OF REMEMBERING

Honoring these storytellers and their work is important. And bringing *Invention of a Slave* into legal memory is important, a step that Frye, a white law professor, has accomplished in a newly visible way.<sup>158</sup> But understanding *Invention of a Slave* as a remembered story requires more. It requires understanding the stakes of that remembering. These stakes shift the opinion from the over-and-done-with past to the here-and-now of law.

So many thoughtful women and men found this “tedious” work worthwhile because of the relationship between *Invention of a Slave* and their claims for full legal personhood for African Americans. They understood that *Invention of a Slave* and its backstory highlighted the significance of the patent system in fundamental debates over citizenship and ability. Keeping its memory alive in every era has been a reminder of the political significance of patents and their potency as tools in support of the goals of the shifting and multifaceted civil rights movement.

Learning this history of remembering has taught me that Ned's story is relevant to our focus of inquiry as legal scholars, that is, to the contours and development of law. In discussing these stakes, as in the preceding sentence, I slip from I/me/mine to we/us/our. I do so to acknowledge that you, reading these pages, are joining me in making the “imagined communit[y]” of law's selective memory,<sup>159</sup> the world shared by those who study, practice, and teach law—who edit, write for, and read law reviews and casebooks in the service of understanding, critiquing, and applying the law.<sup>160</sup> I also invoke the first person plural to invite you to see these stakes as not just the stakes of other people engaged in other projects, but as your own, that is, our own. And as I do so, I recognize that “we” is both

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158. Frye's article *Invention of a Slave*, supra note 4, is an example both of bringing the opinion into legal memory and of encountering this opinion as forgotten. Reactions from readers echoed the perception that the story was relevant to understanding slavery, that is, the past. See Krista L. Cox, *Invention of a Slave, Above the Law* (Aug. 30, 2018), <https://abovethelaw.com/2018/08/invention-of-a-slave> [<https://perma.cc/SYB4-5RAE>]; Matt Novak, *The Story of the American Inventor Denied a Patent Because He Was a Slave*, *Gizmodo* (Aug. 28, 2018), <https://paleofuture.gizmodo.com/the-story-of-the-american-inventor-denied-a-patent-beca-1828329907> [<https://perma.cc/2Y4W-GKQG>] (focusing on the enslaved African American inventor Benjamin Montgomery); see also Wills, supra note 62, at 214–15, 217–19 (building upon Frye's work and discussing African American patent examiner Henry Baker's efforts).

159. Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* 6 (rev. ed. 2006) (defining an imagined community as one in which the members “will never know most of their fellow-members, meet them or even hear of them, yet in the minds of each lives the image of their communion”).

160. See supra note 9 and accompanying text.

a word of invitation and community, and a word of erasure and exclusion.<sup>161</sup> I use it with knowledge that not all of “us” have stayed within law’s color line, unaware of law’s stories beyond it, and that the universalization of “we” is often a universalization of whiteness.<sup>162</sup> I aspire to use “we” with recognition that it encompasses not only the particularities of the “I” revealed in this Essay but of each “you.” Let us, then, together but not identically situated, contemplate what was being remembered and why in the storytelling I have just described.

A. *The Significance of Ned*

Henry Baker first created the still-present linkage between remembering *Invention of a Slave* and the project of identifying African American inventors.<sup>163</sup> By prefacing each publication of his list of African American patentees with the story of Ned and the ways that Oscar and Jeremiah kept his accomplishments unrewarded, Baker used the opinion as evidence of two key points: Uncountable numbers of African American inventors never received patents, and African Americans, even under conditions of enslavement, have always participated in invention.

Ned, an inventor denied a patent by the Attorney General of the United States, stands for all unknown African Americans, both enslaved and free, who were unable to obtain patents and who may have had others take credit for their inventions, never to appear on any list of patentees. Ned is both known and unknown in what history has left us. The details about him, drawn from Oscar’s words, are frustratingly few. They hint at a man who took pride in his work and was thoughtful and creative, coming up with an improvement to the tools he probably was given to mend. What Ned thought about Oscar’s assumption that Ned’s creativity belonged to Oscar and about being claimed as property by a man who considered all African Americans to be a “Serville race” marked by “general Stupidity,” we can only guess.<sup>164</sup> Although 1857 was tantalizingly close to

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161. See Carbado & Moran, *supra* note 26, at 854 (noting that nonwhite racial groups have struggled to become “a part of ‘We, the People’”); Resnik, *supra* note 9, at 221–22, 228, 230 (using “we” to describe commentators on the law, but including quotation marks in recognition that “we” usually refers to those who “sit in the position of privilege”).

162. The heterogeneity of “us” with respect to race and the law is evocatively described in Ansley’s anecdote about her discovery as a white law student of the racial history of the Fourteenth Amendment and the reaction of her black colleague with whom she shared her new knowledge. Ansley, *supra* note 20, at 239–40. The ostensibly colorblind “we” can also universalize masculinity, class, and ability.

163. See *supra* section II.A.

164. Letter from Oscar J.E. Stuart to John A. Quitman, Senator, Miss., *supra* note 38, at 49. This question can never be answered, but letters from another enslaved blacksmith in Mississippi, written in 1844 to his owner, the newly elected President James Polk, provide interesting context. See Adam Rothman, “My Dear Master”: An Enslaved Blacksmith’s Letters to a President, Insights: Scholarly Work at the John W. Kluge Ctr. (Feb. 5, 2019), <https://blogs.loc.gov/kluge/2019/02/my-dear-master-an-enslaved-blacksmiths-letters-to-a-president> [<https://perma.cc/H4YK-6WKA>] (providing an example of a letter addressed

Emancipation, we do not know whether Ned survived the war to build a life as a free man. As a Black History Month story recounted in 1996, “No one knows what happened to Ned.”<sup>165</sup>

Those unknown inventors who never obtained patents include other enslaved women and men as well as free blacks in the time of slavery who lacked resources to access the patent system.<sup>166</sup> They also include African Americans from every decade after Emancipation who faced barriers in the form of constrained access to education, capital, and employment opportunities, as well as threats to their health and security. Even without formal racial barriers to the patent office, antiblack racism in law and society created de facto barriers to patents that only some have been able to overcome, both in the past and today.<sup>167</sup>

In remembering Ned, however, we also remember that African Americans have always participated in the development and improvement of technology.

His accomplishment swells the too-thin ranks of *known* African American inventors, particularly from the time of slavery when both legal and social barriers to invention and patents were extraordinarily high.<sup>168</sup> Baker’s list, and the work of all those who have republished and extended it, uses the records of the patent office to support this historical fact. Remembering *Invention of a Slave* in the context of the ongoing process of identifying black inventors underscores that African American contribution to invention has been continuous. For every black patentee identified,

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from a skilled enslaved man to his enslaver, despite the legal and customary restrictions on slaves becoming literate).

165. Michael Dabney, *The African American Contribution to Science and Technology*, Phila. Trib., Feb. 13, 1996, at IJ. Note that the Philadelphia Tribune was founded as a black-owned newspaper to report on the African American experience. Our History, Phila. Trib., <https://www.phillytrib.com/site/about.html> [<https://perma.cc/C4L4-Y9N4>] (last visited Jan. 31, 2020). This article is illustrative of the continuing remembrance of *Invention of a Slave* in popular venues, showing the success of efforts by Woodson, Yancy, Sluby, and others to make the opinion and the history of the African American inventor part of popular history and also highlighting the color line that circumscribes their efforts in venues beyond law.

166. Sluby, *Inventive Spirit*, supra note 65, at 10–15, 20 (providing some examples).

167. See Lisa D. Cook, *Inventing Social Capital: Evidence from African American Inventors, 1843–1930*, 48 *Explorations Econ. Hist.* 507, 516 (2011) (noting that “factors limiting social capital, such as segregation laws, are negatively and significantly correlated with patent activity”); Lisa D. Cook, *Violence and Economic Activity: Evidence from African American Patents, 1870–1940*, 19 *J. Econ. Growth* 221, 248 (2014) (“The most valuable patents . . . were sensitive to acts of hate-related violence and to laws promoting racial segregation.”); Sarada Sarada, Michael J. Andrews & Nicolas L. Ziebarth, *Changes in the Demographics of American Inventors, 1870–1940*, *Explorations Econ. Hist.*, Oct. 2019, at 1, 6 (showing nonwhite inventors are consistently underrepresented in patents through 1940); Lisa D. Cook & Chaleampong Kongcharoen, *The Idea Gap in Pink and Black* 39 (Nat’l Bureau of Econ. Research, Working Paper No. 16331, 2010), <http://ssrn.com/abstract=1673676> [<https://perma.cc/P3KD-A993>] (showing patent rates for African Americans 1976–2008).

168. James, *The Real McCoy*, supra note 36, at 31–42; Sluby, *Inventive Spirit*, supra note 65, at 11–36; see also Frye, supra note 4, at 185–88.

uncountable numbers of other African American inventors existed, making listmaking both worthwhile and an insufficient measure to show “what contribution the American Negro has made to the inventive skill of this country.”<sup>169</sup>

B. *The Significance of Jeremiah*

The political import of this dual message was clear to the antebellum free black community at the time Jeremiah denied Oscar and Ned a patent, applying the logic of *Dred Scott*. By 1858, when Jeremiah shut the door of the patent office to all African American inventors, the free black community had already linked patents to citizenship. In the decades before *Dred Scott*, the anti-slavery press publicized the rare instances of patents granted to black men as evidence both of African American ability and of government recognition of the citizenship of their recipients.<sup>170</sup> As Jeremiah noted, patent applicants had to take an oath of citizenship. These antebellum patents were thus evidence disproving Chief Justice Roger Taney’s claim in *Dred Scott* that African Americans had never been recognized as U.S. citizens.<sup>171</sup>

Frederick Douglass, the nationally known African American orator, author, and activist, used his anti-slavery newspaper to highlight the link between patents and citizenship in 1859, when the patent office considered itself bound by Jeremiah’s opinion to reject applications from African Americans. He published a lengthy obituary for Thomas Jennings of New York City, “one of that large class of earnest, upright colored men who dwell in our large cities.”<sup>172</sup> Jennings, like Douglass, was an activist, founding the Legal Rights Association and suing the city for discrimination after municipal employees ejected his daughter from a streetcar. He also was a skilled tailor and operated his own business. His patent, obtained in 1821, was for a method of dry-cleaning clothing.<sup>173</sup> The newspaper reported that

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169. Baker, *The Negro as an Inventor*, supra note 32, at 399.

170. See, e.g., *A Colored Inventor*, Frederick Douglass’ Paper, July 29, 1853, at 2 (describing F. Murrows, *Brush Handle*, USPN 8,911, issued April 27, 1852); see also *Invention by a Negro*, *The Liberator*, May 14, 1836, at 79 (publicizing Henry Blair’s patents in an abolitionist newspaper edited by white northerner William Lloyd Garrison). As of yet, no female African American patentees have been identified in the antebellum period, which does not prove that none existed. The earliest known female black patentee is Judy W. Reed of Washington, D.C, who received a patent in 1884. Sluby, *Inventive Spirit*, supra note 65, at 126.

171. *Dred Scott v. Sandford*, 60 U.S. 393, 404–05 (1857).

172. Thomas L. Jennings, 1 *Anglo-Afr. Mag.*, Apr. 1859, at 126–28 (reprinted from Frederick Douglass’ Paper). The *Anglo-African*, a monthly magazine, which reprinted the obituary, was itself an African American publication. *African-American Newspapers and Periodicals: A National Bibliography* 44 (James P. Danky & Maureen E. Hady eds., 1998).

173. U.S. Patent Office, *A Digest of Patents Issued by the United States from 1790 to January 1, 1839*, at 89, 550 (1840). For details of Jennings’ life, see Thomas L. Jennings, supra note 172, at 126–28.

Jennings kept his patent framed above his bed as evidence that he was a “citizen of the United States.”<sup>174</sup>

Remembering Jeremiah’s opinion as a change from previous patent office practice thus falsified the reasoning of *Dred Scott* and emphasized the value of black patentees, who, Jeremiah was implicitly agreeing, had received patents as citizens.

### C. *The Significance of Oscar*

Patents, as legal historian Martha Jones has pointed out, were only one of multiple types of government documents used to support African American claims to citizenship in the antebellum period.<sup>175</sup> They had a unique role, however. As Baker noted, they proved “inventive skill.”<sup>176</sup> Inventiveness was a prized mental ability. Patents not only indicated citizenship *status*, but in ways that continued to have relevance after the overruling of *Dred Scott* and the demise of the law of slavery, demonstrated the *capacity* of their holders to perform citizenship duties. This additional political meaning was apparent to the free black community at the time *Invention of a Slave* was written, and its persistence can be understood as we remember Oscar.

Six weeks after Jeremiah’s opinion issued, the free black community of Massachusetts met as the Convention of the Colored Citizens to discuss and defend their legal status. The delegates listened to a call to defy “every living man who stood against them,” “never forgetting Judge Taney.”<sup>177</sup> *Dred Scott* was the outrageous new legal opinion that needed to be fought, in addition to the dangerous and hated Fugitive Slave Act of 1850.<sup>178</sup> Amid their discussions of these threats to the black community, the attendees also passed resolutions noting “facts” to “silence the assertions of the pro-slavery traducers”—the facts being the recent inventions of two men, in firefighting and steam railways, as “colored American Inventors.”<sup>179</sup> African American inventors in the age of slavery were political facts, even when the pathway to patenting was blocked. These facts, the delegates asserted, had the power to silence “pro-slavery traducers,” like Oscar.

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174. Thomas L. Jennings, *supra* note 172, at 127.

175. Martha S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* 12, 43 (2018).

176. Baker, *The Negro as an Inventor*, *supra* note 32, at 399.

177. Minutes of 1858 Convention of the Colored Citizens of Massachusetts, August 1, 1858, *in* 2 *The Proceedings of the Black State Conventions, 1840–1865*, at 1–2 (Philip S. Foner & George E. Walker eds., 1979).

178. Pub. L. No. 31-60, ch. 60, 9 Stat. 462 (1850).

179. Minutes of 1858 Convention of Colored Citizens of Massachusetts, August 1, 1858, *supra* note 177, at 7. Just as earlier African American researchers found original source materials related to Ned’s story, see *supra* Parts I–II, curator Portia James was the first to use this source to better understand the significance of African American invention. James, *To Collect Proof*, *supra* note 155, at 55.

Oscar had casually emphasized the “general Stupidity” of the “Serville race,” a characterization he believed his powerful white correspondents, including the men who supervised the patent system, shared.<sup>180</sup> The delegates offered “colored American Inventors” to counteract that assumption underlying the ideology of slavery, hoping that others would see the contradiction between Oscar’s biologically justified racism and African American inventiveness, even though Oscar did not.

Oscar helps us to understand why this antebellum strategy of using black inventors as political facts continued to be necessary long after the end of slavery and why patents held such significance that Baker and others would devote so much effort to developing comprehensive lists of African American patentees. While no one knows what happened to Ned, we do know a bit about Oscar’s subsequent history, thanks to Yancy. Mississippi seceded from the Union in January 1861, and Oscar served as a colonel in the Confederate Army during the Civil War.<sup>181</sup> After the war, he moved to Kentucky, perhaps driven by his opposition to Reconstruction, with its policies that brought African Americans into the social and political life of Mississippi.<sup>182</sup> It is likely that the collapse of slave society did not change his mind about white supremacy any more than had the evidence of Ned’s inventive ability.

Although slavery was abolished and the Constitution amended to include African Americans within its guarantees to citizens, Oscar and many other white Americans in the North and South continued to believe that only white people, what Oscar had called the “Political” race, were fit to participate in democratic self-government. Led by some of the most educated men of the day, white Americans persisted in the powerful and pernicious belief that there were distinct biological races and that there was a natural hierarchy of races, with whites the most superior and blacks the most inferior in many abilities. Racial science conveniently explained the need to keep African Americans from political, social, and economic participation.<sup>183</sup>

One significant argument was that persons of African descent were limited in mental capacity such that they could only imitate and were unable to originate new creations or technologies. Patents were government grants issued only to originators and a limited class of originators at that. By the mid-nineteenth century, United States patent law placed heavy emphasis through doctrines of novelty and priority on identifying “first

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180. Letter from Oscar J.E. Stuart to John A. Quitman, Senator, Miss., *supra* note 38, at 49.

181. Hardeman, *supra* note 41, at 18; Yancy, *Stuart Double Plow*, *supra* note 35, at 51.

182. See Yancy, *Stuart Double Plow*, *supra* note 35, at 51.

183. McMurry, *supra* note 116, at 2–3. For additional information on scientific racism, see generally William Stanton, *The Leopard’s Spots: Scientific Attitudes Toward Race in America, 1815–1859* (1960). Note that while this Essay focuses on antiblack racism, racism in the United States encompasses other people of color.

and true” inventors, seeking to deny patents to imitators.<sup>184</sup> Further, in the second half of the nineteenth century, judicial opinions increasingly limited patents to those whose ideas were truly inventive, as distinguished from the obvious technical improvements that might occur to any “ordinary mechanic.”<sup>185</sup> These doctrines gave patents their continued political potency. A failure to earn patents was a failure to demonstrate the ability to originate. Conversely, each patent granted to an African American was yet another fact that a member of that group had such ability. Baker’s list thus became evidence of collective ability that refuted accusations of collective disability. These were the stakes of remembering, motivating that “tedious” work.

#### IV. THE COSTS OF FORGETTING

In addition to the stakes of remembering, Ned, Jeremiah, and Oscar teach the costs of our selective legal memory. As my own experience proves, despite the storytellers’ efforts, white America and legal America forgot their story. Making these storytellers part of the story demonstrates how the color line that delineates legal memory has been created and maintained. This color line is not simply a disciplinary boundary. It is neither surprising nor blameworthy that busy legal practitioners did not look to historians to learn about an overturned opinion. This history teaches, however, that the texts of the law have not only been limited by discipline, but also by the perceived race of authors and their subjects. As Du Bois noted at the start of the twentieth century, the “problem of the color-line” is everywhere, dividing the “two separate worlds” of black and white Americans not only spatially, into separate schools and homes and jobs, but also imaginatively, through print culture.<sup>186</sup> It was no accident that

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184. These doctrines included a refusal to allow patents of importation (that is, grants to people who introduced a new technology that they themselves did not invent) and novelty rules that awarded patents to the earliest inventor, rather than the first to file a patent application. For the early development of these doctrines, in the patent acts and in judicial opinions, see Oren Bracha, *Owning Ideas: The Intellectual Origins of American Intellectual Property, 1790–1909*, at 220–21 (2016); B. Zorina Khan, *The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790–1920*, at 49–50 (2005); Edward C. Walterscheid, *To Promote the Progress of Useful Arts: American Patent Law and Administration, 1787–1836*, at 14 (1998); Edward C. Walterscheid, *Priority of Invention: How the United States Came to Have a “First-to-Invent” Patent System*, 23 *AIPLA Q.J.* 263, 317–19 (1995).

185. See *Hotchkiss v. Greenwood*, 52 U.S. 248, 267 (1850) (“[U]nless more ingenuity and skill . . . were required . . . than were possessed by an ordinary mechanic acquainted with the business, there was an absence of . . . [the] skill and ingenuity which constitute essential elements of every invention. . . . [T]he improvement is the work of the skilful [sic] mechanic, not that of the inventor.”); Bracha, *supra* note 184, at 227–31 (describing *Hotchkiss v. Greenwood* and the subsequent development of the “inventorship principle”).

186. Du Bois, *The Souls of Black Folk*, *supra* note 23, at 96, 166. History, too, has its color line. Baker and Yancy published in journals like *Negro History Bulletin* and *Journal of Negro History* both to reach African American audiences and because history journals with

Ned's story was not discussed in the recognized outlets that create the imagined community of lawyers.<sup>187</sup>

Second Assistant Patent Examiner Baker, clinging to the bottom rung of the career ladder in an increasingly segregated federal workforce and city, published his work in an NAACP pamphlet, a volume edited by an African American, and in an African American history journal, but not in the newly established journal in which his white patent office colleagues were publishing articles about patents and patent history.<sup>188</sup> That fact suggests strongly that Baker and/or his subject were not welcome in the pages of the *Journal of the Patent Office Society*, despite Baker's law degree. His work appeared in the *Journal* only after his death, in articles giving authorship credit to white men. Even four decades after Sluby broke the color line in the *Journal* to discuss African American inventors, her article remained so little known among lawyers and legal scholars that *Invention of a Slave* could be a "forgotten IP case."<sup>189</sup>

Both the intransigence and the costs of this legal color line were obvious in 1913 when the founders of the NAACP published and promoted Baker's pamphlet *The Colored Inventor* and remain relevant today when racism and implicit bias continue to shape law and society with implications for the patent system and citizenship debates.

#### A. *Tracing the Costs*

In 1913, Baker noted that although his list of nearly 400 African American patentees sat in a book on the shelves of the Library of Congress (referencing his essay in Culp's volume), a candidate for Congress in Maryland, fighting a "hotly contested" election, had recently asserted "that the colored race should be denied the right to vote because . . . 'no one of the race had ever yet reached the dignity of an inventor.'"<sup>190</sup>

This syllogism that African Americans could not invent and therefore should not be permitted to vote rested on two pillars: white forgetting and the political meaning of patents. It was only by forgetting Ned and the uncounted others who invented and patented that the Maryland politician and his white audiences could believe there was no such person as a black inventor. That forgetting permitted white leaders seeking to maintain, expand, and justify white supremacy in American law and society to make the repeated assertion that African Americans could not invent as proof of black inferiority. That assertion had political power because of the political

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higher circulations and more prestige did not publish African American authors or African American history. See *supra* notes 108, 135–141 and accompanying text.

187. Cf. Anderson, *supra* note 159, at 63 (analyzing print media as a way of creating "imagined communities").

188. Taylor, *supra* note 66, at 334–39.

189. See *supra* note 11 and accompanying text.

190. Baker, *The Colored Inventor*, *supra* note 29, at 3 (quoting one of the candidate's speeches).

meaning of patents as certification of inventive ability, that is, the ability to originate and not just imitate.

This claim became a favorite of politicians seeking to limit or nullify the Reconstruction Amendments and construct a Jim Crow society, complete with race-based franchise exclusions, because the ability to think independently had long been identified as a crucial ability in a democratic republic that required its citizens to self-govern through the franchise and other civic acts, like jury service and elected office. In American political thought, espoused by many of the Founders, those who only imitated were dangerous to the polity, because they merely copied opinions and actions. Such persons would be too easily swayed by demagogues, the argument ran. Democratic republicanism required independent thinkers. In the early republic, states sought to create an independent electorate by limiting suffrage to the propertied.<sup>191</sup> By the mid-nineteenth-century, however, many states had loosened property limits on white male suffrage.<sup>192</sup> Instead, identity became the means of distinguishing those able to exercise the franchise based on presumed innate ability.<sup>193</sup> Even after the Reconstruction Amendments guaranteed citizenship and black male suffrage, free African Americans joined women, Native Americans, children, and the insane as those excluded from full legal personhood as presumptively disabled.<sup>194</sup>

Patents as certification of inventive ability and a proxy for independent thought were thus facts relevant to the boundaries of citizenship as established in law and society. By the time the newly formed NAACP used its resources to publish *The Colored Inventor*, the assertion that African Americans had never received patents or invented had become persuasive evidence that the tightening legal strictures constraining black citizenship in Jim Crow America were justified. In 1886, one of the first African American activists to publish Baker's list, the Reverend Richard W. Wright, warned that it was neither "prudent [n]or sagacious" to ignore the repeated claims he saw in Southern newspapers of black inventive inability.<sup>195</sup> Wright claimed that "six out of every seven men" believe it is scientifically provable "that Negroes have no faculty for invention."<sup>196</sup>

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191. Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 9–12 (2000) (describing justifications for retaining colonial property requirements).

192. *Id.* at 52.

193. Laura E. Free, *Suffrage Reconstructed: Gender, Race, and Voting Rights in the Civil War Era* 11–17 (2015).

194. Welke, *supra* note 27, at 6–13 (describing how "ability, no less than race and gender, was fundamental to personhood and citizenship," from "the nation's founding . . . throughout the long nineteenth century," as "[f]undamental rights of personhood . . . were limited to 'the able'").

195. Wright, *supra* note 81, at 398.

196. *Id.* at 398–99. Richard R. Wright, Sr., born enslaved in Georgia, was an educator and banker and active in Republican politics. Kevin F. Modesto, "Won't Be Weighted Down:"

If, as six out of seven white Americans believed, African Americans could not invent and were limited to imitation, they lacked this ability crucial to democratic self-governance. That belief rested on forgetting the lessons of *Invention of a Slave*. The costs of that forgetting were and are *legal* costs that reach far beyond the patent office. The costs are paid in the continuing strength of legal and social racial hierarchies.

It is noteworthy that during the decades when federal courts and legislators permitted states to pass and enforce Jim Crow laws, the patent office was a rare locus where rights could be asserted and secured in ways that were both formally and practically race-blind. States control many of the “rights of belonging,” such as the right to vote, to serve on juries, to attend public schools, and to get business permits and gun licenses, but they do not control any aspect of the federal patent system. While Baker noted that “it rarely leaves anything to the imagination” when an African American inventor comes “to the Patent Office to look after his invention,” such appearances are not required by the law.<sup>197</sup> There was no legal requirement for black inventors to submit themselves to the racial categorization of white America in order to receive a patent.<sup>198</sup> African Americans could (and did) originate and invent—and despite persistent and serious social, financial, and educational hurdles to patenting, some did so. Those patents represented not only the innovation and ambitions of each patentee to commercialize an invention, but a collective political resource to combat the costs of *de jure* and *de facto* racial inequality.

Even as legal changes dismantled the first Jim Crow regime in the second half of the twentieth century, African Americans such as Burt, Diggs, Yancy, Sluby, and James continued to recognize and use the political power of patents, knowing that their community was continuing to pay these costs.<sup>199</sup> The arguments of “pro-slavery traducers”<sup>200</sup> did not disappear with the surrender of the Confederacy, nor with the passage of the Civil Rights Act of 1964, but continue as part of the ideology of white supremacy.

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Richard R. Wright, Jr.’s Contributions to Social Work and Social Welfare, *J. Soc. & Soc. Welfare*, June 2004, at 69, 71–72.

197. Baker, *The Colored Inventor*, *supra* note 29, at 4, 6. Note that patent examiners, historically and at present, are not free from implicit biases based on names as well as appearance. See, e.g., Kyle Jensen, Balázs Kovács & Olav Sorenson, Gender Differences in Obtaining and Maintaining Patent Rights, *36 Nature Biotechnology* 307, 307–09 (2018) (providing data suggesting that the perceived gender of an inventor as indicated by first name can influence patent application outcomes).

198. Cf. Baker, *The Colored Inventor*, *supra* note 29, at 4 (noting that the Patent Office’s records did not take note of race).

199. Scholars have been identifying current legal regimes with racially segregating impact as a “new Jim Crow,” referring to what I am calling the first Jim Crow as “old Jim Crow.” See, e.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 2–3 (Tenth Anniversary ed., 2020) (“We have not ended racial caste in America; we have merely redesigned it . . . [under] the New Jim Crow.”).

200. See *supra* note 179 and accompanying text.

Remembering Ned, Oscar, and Jeremiah thus remains part of the project of altering law and society, in Daniel Culp's aspirational words of 1902, to "reach that point in the American civilization, where [the African American] will be recognized and treated as any other American citizen."<sup>201</sup> These stakes did not dissolve when *Invention of a Slave* ceased to be persuasive legal authority, but rather remain relevant in the twenty-first century.

B. *Mitigating the Costs*

Mitigating the costs of selective legal memory, the past teaches us, is a project already begun and one involving many voices and many lifetimes. Rather than pretend to solve the problem of law's color line, I return to the particularity of my own responses to this case study.<sup>202</sup> My first response has been this Essay, weaving stories of the past in ways calculated to reach the keepers and transmitters of law's memories and seeking to use an uncommon angle—patent law—to make the color line visible and, thereby, a problem to be solved rather than the unquestioned status quo.

I have recognized, too slowly, that our selective legal memory has allowed me to be repeatedly surprised by Ned's accomplishment and those of the many other African American inventors, free and enslaved, who have been a part of our history at least since Africans landed in Jamestown in 1619.<sup>203</sup> That surprise perpetuates the racism of low expectations that motivated Baker and the NAACP in 1913 to publish his pamphlet, and feeds implicit biases and explicit racism.<sup>204</sup> By exclaiming with wonder at the tale of an inventive blacksmith, a black railroad engineer, or an African American beauty entrepreneur, I imply that there is reason to be surprised, as if a designated subset of U.S. citizens is not expected to invent, as if George Washington Carver, perhaps the only famous black inventor, was *sui generis*.<sup>205</sup> It is my obligation to avoid perpetuating that surprise by positioning Ned and the broader history of African American inventiveness

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201. Culp, Dedication, *supra* note 87.

202. I do so having already confessed my limited past success in mobilizing historical insights to effect change. See Swanson, *supra* note 17, at 190–94 (recounting my personal reflections on transmittal, the process of "broadcasting . . . scholarship to all those that might benefit, audiences divided by methodological and epistemological commitments, in ways that these audiences can appreciate and use").

203. See Lorena S. Walsh, Chapter 3: Assessment of Contemporary Literature, *in* Martha W. McCartney, *A Study of the Africans and African Americans on Jamestown Island and at Green Spring, 1619–1803*, at 5, 8 (2003), <https://www.nps.gov/jame/learn/historyculture/upload/African%20Americans%20on%20Jamestown%20Island.pdf> [<https://perma.cc/UF6E-C32V>]. These forced migrants, as well as later survivors of the Middle Passage, brought African technical knowledge with them, making African inventiveness—as well as African American inventiveness—part of U.S. history. See Sluby, *Inventive Spirit*, *supra* note 65, at 1–8.

204. See *supra* notes 90–95 and accompanying text.

205. Elijah McCoy (1843–1929) obtained at least fifty patents for his steam engine inventions. Portia P. James, *Elijah McCoy*, *Am. Nat'l Biography*, <https://www.anb.org/view/10.1093/anb/9780198606697.001.0001/anb-9780198606697-e-1301093> [<https://perma.cc/>

as coextensive with the history of American inventiveness in my teaching and writing, rather than as rare examples distinct from assumed whiteness of technology creation in North America.<sup>206</sup> While Ned is only one of a myriad of such inventors—some of whose stories are known in much more detail—his story is particularly well suited to separating biological assumptions from the politics of racism in legal settings, since his invention resulted in Jeremiah’s opinion, which had a profound, if fleeting, legal consequence.<sup>207</sup> A three-sentence opinion can slip easily into a syllabus.

What I have learned from these storytellers about the stakes of remembering Ned is also causing me to rethink the stakes of current conversations about inclusivity and access to the patent system.<sup>208</sup> Understanding patents as political facts is a new perspective for those of us trained in patent law. We are accustomed to evaluating the patent system on its ability to “promote the progress of [the] useful arts” by encouraging technological innovation through individual economic reward.<sup>209</sup> In a

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E3EW-TGQU] (last visited Jan. 25, 2020). Madam C.J. Walker (Sarah Breedlove) (1867–1919) used her business acumen to turn her hair care products into a business empire without the aid of patents, becoming the wealthiest self-made woman in the United States. See A’Lelia Bundles, *On Her Own Ground: The Life and Times of Madam C.J. Walker* 21 (2001). I base my characterization of Carver’s fame on consistent audience reactions when I talk about black inventors; his name is inevitably the first, and often the only, that comes up. See George Washington Carver, 28 *J. Negro Hist.* 117, 118 (1943) (describing Carver as attaining “a popularity which no Negro since Booker T. Washington has enjoyed” through which he was known to “[t]he whole civilized world”); Retrospective: George Washington Carver, 11 *Africology: J. of Pan Afr. Stud.* 222, 224 (2018) (“Nearly every American can cite at least one of the accomplishments of George Washington Carver.”). For the life of this formerly enslaved scientist, including his support for the black history movement and his research while affiliated with the Tuskegee Institute, see generally, e.g., Shirley Graham Du Bois & George D. Lipscomb, *Dr. George Washington Carver, Scientist* (1944); Mark D. Hersey, *My Work Is That of Conservation: An Environmental Biography of George Washington Carver* (2011); Christina Vella, *George Washington Carver: A Life* (2015).

206. Although outside the scope of this Essay, this obligation also includes consideration of technology creation by Native Americans and other groups who have been designated as nonwhite, including Latinx peoples and Asian Americans.

207. These stories are told in many of the sources cited above. The books by James, Sluby, and Fouché, *supra* notes 36 and 65, make excellent starting points. And if you are seeking to influence the next generation at a younger age than your average law student, see generally Kareem Abdul-Jabbar & Raymond Obstfeld, *What Color Is My World?: The Lost History of African-American Inventors* (2012) (presenting African American history in a children’s book co-authored by activist and amateur historian Abdul-Jabbar).

208. See generally, e.g., Holly Fechner & Matthew S. Shapanka, *Closing Diversity Gaps in Innovation: Gender, Race, and Income Disparities in Patenting and Commercialization of Inventions*, 19 *Tech. & Innovation* 727 (2018) (discussing gender, race, and income patent gaps).

209. U.S. Const., art. I, § 8, cl. 8; see also, e.g., Sapna Kumar, *Patent Law and Progress*, 55 *Hous. L. Rev.* 265, 265 (2017) (asserting that it is “critical for scholars to regularly assess whether patent law continues to promote progress”). For discussions of other functions of the patent system, see William Hubbard, *Inventing Norms*, 44 *Conn. L. Rev.* 369, 414 (2011); Sapna Kumar, *Innovation Nationalism*, 51 *Conn. L. Rev.* 205, 207–10 (2019) [hereinafter Kumar, *Innovation Nationalism*]; Jason Rantanen & Sarah E. Jack, *Patents as Credentials*, 76 *Wash. & Lee L. Rev.* 311, 313–21 (2019).

world of corporate research, we consider the collective use of patents in portfolios and pools, but remain unaware of the continuing significance of patents as a collective resource for those advocating for group inclusion.<sup>210</sup> Understanding patents as proof of a prized ability with political meaning adds new dimensions to analyzing the use and functioning of the patent system today.

For I have realized that the political meaning of patents is also “something that is happening.”<sup>211</sup> Patents remain potent symbols of individual ability as well as a collective source of national pride.<sup>212</sup> The patent office provides space for and collaborates with the National Inventors Hall of Fame to honor and publicize American inventors, celebrating original thought.<sup>213</sup> The United States government, led by the patent office, claims the significance of patents, in both number and quality, in demonstrating a characteristic of the United States people that distinguishes this country from the rest of the world, echoing Baker’s analysis that inventive skill is a valued contribution to the nation.<sup>214</sup> Underscoring the continued link between patents and citizenship, patents collectively granted to immigrants are offered as evidence of their worthiness to join the United States community.<sup>215</sup> Demonstrating participation in the patent system remains a way of claiming to be an American, fully within the borders of belonging.

Recognizing this meaning and its stakes adds new urgency to the severe underinclusion of persons of color, particularly African Americans,

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210. See, e.g., Michael Mattioli, *Patent Pool Outsiders*, 33 *Berkeley Tech. L.J.* 225, 229–30 (2018); David S. Olson, *Removing the Troll from the Thicket: The Case for Enhancing Patent Maintenance Fees in Relation to the Size of a Patent Owner’s Patent Portfolio*, 68 *Fla. L. Rev.* 519, 521 (2016).

211. See *supra* note 26 and accompanying text.

212. Kumar, *Innovation Nationalism*, *supra* note 209, at 229.

213. USPTO and National Inventors Hall of Fame Programs, U.S. Patent & Trademark Office, <https://www.uspto.gov/learning-and-resources/ip-programs-and-awards/uspto-and-national-inventors-hall-fame-programs> [<https://perma.cc/B6HF-3HTR>] (last visited Jan. 28, 2020).

214. See, e.g., Press Release, U.S. Patent & Trademark Office, *United States Moves Up in International Rankings for Patent Protection* (Feb. 7, 2019), <https://www.uspto.gov/about-us/news-updates/united-states-moves-international-rankings-patent-protection> [<https://perma.cc/3QAF-9MN8>]; see also Kumar, *Innovation Nationalism*, *supra* note 209, at 208, 226–30 (arguing that since the 1970s, the United States began to use patents to claim a “national identity” of “technological innovativeness” and noting that invention and innovation are distinct).

215. See, e.g., Ufuk Akcigit, John Grigsby & Tom Nicholas, *Immigration and the Rise of American Ingenuity*, 107 *Am. Econ. Rev. (Papers & Proc.)* 327, 327–28 (2017) (offering an analysis of immigrant inventors from 1880 to 1940 as “evidence of the impact of immigrants on U.S. innovation”); Shai Bernstein, Rebecca Diamond, Timothy McQuade & Beatriz Pousada, *The Contribution of High-Skilled Immigrants to Innovation in the United States 1*, 28 (Stanford Bus. Sch., Working Paper No. 3748, 2018), [https://web.stanford.edu/~diamondr/BDMP\\_2019\\_0709.pdf](https://web.stanford.edu/~diamondr/BDMP_2019_0709.pdf) [<https://perma.cc/9QNY-H4AX>] (using patents issued from 1976 to 2012 to measure immigrants’ contributions to innovation).

in the patent system.<sup>216</sup> Once we see patents as political facts, we can appreciate that the rate at which African Americans apply for and receive patents is more than just another data point in discussions of STEM education or the innovation economy, or a question of distributive justice, although it is all those things.<sup>217</sup> The patent system both remains a means of reifying racial hierarchies and offers the opportunity to destabilize them.<sup>218</sup> As the activists I have highlighted understood, that opportunity expands as the list of African American patentees grows. At a moment when the U.S. Patent and Trademark Office is requesting authority to collect data on the sex and race identification of applicants, remembering Ned, Jeremiah, and Oscar underscores the need for such data as a way to create such lists.<sup>219</sup> It also provides an additional incentive to encourage participation by marginalized groups in the patent system, reminding us that doing so will renegotiate the borders of belonging in ways that reverberate far beyond patents.

I recognize that many of the storytellers whose history I have excavated had no interest in technological innovation or patent office policy. Rather, their efforts were directed to questions of race and rights, of citizenship and belonging, and of the role of law in shaping American identity, providing an important reminder that such questions are answered in many places. They have taught me that law's selective memory imposes costs on the work of understanding what the law is, how it is working, and particularly, where and how the fault lines of entrenched racism in the United States continue to disrupt our legal promises of equality and inclusion. They encourage me to shift back from "I" to a "we" that I imagine includes many who never think about patents but are interested in these overarching questions of law and society in order to suggest that we need to shift our attention in at least two ways. By looking across law's color line,

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216. Adam Nager, David Hart, Stephen Ezell & Robert D. Atkinson, *The Demographics of Innovation in the United States* 6 (2016) (noting that U.S.-born African Americans are severely underrepresented in twenty-first century patenting).

217. Peter Lee, *Toward a Distributive Agenda for U.S. Patent Law*, 55 *Hous. L. Rev.* 321, 325 (2017) (arguing that patent law has "distributive mechanisms" that should be fostered).

218. While this Essay has focused on the relationship between the patent system and antiblack racism by considering the racial (non)identification of inventors, there is a related relationship between the patent system and racial categories through the use of racial language in issued patents that also serves to reify racial hierarchies, see generally Shubha Ghosh, *Identity, Invention and the Culture of Personalized Medicine Patenting* (2012); Shubha Ghosh, *Race-Specific Patents, Commercialization, and Intellectual Property Policy*, 56 *Buff. L. Rev.* 409 (2008); Jonathan Kahn, *Race-ing Patents/Patenting Race: An Emerging Political Geography of Intellectual Property in Biotechnology*, 92 *Iowa L. Rev.* 353 (2007); Jonathan Kahn, *Revisiting Racial Patents in an Era of Precision Medicine*, 67 *Case Western Res. L. Rev.* 1153 (2017).

219. Andrei Iancu & Laura A. Peter, U.S. Patent & Trademark Office, *Study of Underrepresented Classes Chasing Engineering and Science Success: SUCCESS Act of 2018*, at 3 (2019), <https://www.uspto.gov/sites/default/files/documents/USPTOSuccessAct.pdf> [<https://perma.cc/T7DX-6B44>]. For the background of this study, see Lee, *supra* note 217, at 351–52.

we can learn legal stories we need to understand. Further, we need to recognize that the borders of belonging are forged in all parts of law and its bureaucracies, not just in the regulation of physical borders and polling places, or in designated civil rights laws. Fundamentally, understanding over a century of remembering Ned's story teaches us the political stakes of our participation in law's memory, a present happening worth remembering.