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Race and Races: Cases and Resources for a Diverse America, Third Edition - Table of Contents and Introduction

Stephanie M. Wildman
Santa Clara University - School of Law, swildman@scu.edu

Jean Stefancic
University of Alabama - School of Law, jstefancic@law.ua.edu

Richard Delgado
University of Alabama - School of Law, rdelgado@law.ua.edu

Angela P. Harris
University of California, Davis, apharris@ucdavis.edu

Juan F. Perea
Loyola University of Chicago - School of Law - Faculty, jperea@luc.edu

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THE UNIVERSITY OF
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RACE AND RACES: CASES AND RESOURCES FOR A
DIVERSE AMERICA, 3d ed. 2015
Table of Contents and Introduction

Richard Delgado
Jean Stefancic
Juan Perea
Angela Harris
Stephanie Wildman



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INTRODUCTION

■ ■ ■

As we go to press in fall 2014, the United States is in many ways a radically different country from the one the Framers envisioned. The principal racial issues confronting the Framers were the conquest of Indian nations and the perpetuation of black slavery. Our historical and cultural inheritance includes the unresolved legacy of those early racial dilemmas as well as additional ones that we confront today as a result of our increasingly multiracial makeup and citizenry. For example, are African Americans and Mexican Americans due reparations, like those the government paid to Japanese American families imprisoned during World War II? Should members of these groups receive a formal apology for the treatment suffered by their ancestors, as Congress expressed in a recent joint resolution apologizing for the colonization of Native Hawaiians? Should African Americans and members of other racial minority groups receive affirmative action in hiring, government contracting, and admissions to higher education? What does a sensible immigration policy look like in an age of heightened concern over limited resources and the threat of terrorism? What should the government do to eliminate vestiges of its colonial past in places like Puerto Rico, Guam, and Hawaii?

What measures should the United States take to improve the legislative representation of minority groups, who may otherwise be outvoted consistently? What happens when one group uses a constitutional right, such as free speech, to demean and hector another? How can society ease tensions among racial groups over such issues as policing? In the end, how can we do more justice in our racially diverse society?

Persons of color today make up slightly over one-third of the U.S. population: African Americans (14%); Latinos/as (16%); Asian Americans (5%); and American Indians (1%). Because these groups are growing more rapidly than Whites, persons of color will likely begin to outnumber Whites in the United States sometime near the middle of this century. The demographics of our future will become ever more complex, more multiracial, as members of different racial groups intermarry, adding to the racial complexity already evident today.

Each of us has taught and written about race for most of our careers. We have all confronted the need for and the difficulty of assembling varied interdisciplinary and historical materials to address race and racism comprehensively, in a manner that accounts for each of the principal racial groups in the United States—African Americans, Indians, Latinos/as, Asian Americans, mixed-race people, Muslims, and Whites.

This casebook is the first to present race and racism in a manner that addresses the racial diversity of American society. Teachers and students committed to understanding our culture and history require ready access to legal and

interdisciplinary materials that shed light on our continuing and changing problems of race. To ease and amplify comprehension of the increasing complexity of American racial dynamics, we have written this book.

We explore the cutting edges of theory with respect to race, giving central attention both to the *continuity* across history of certain beliefs about race and the *evolution* of those interpretations, a process that continues in our time. Thus this book includes materials on the difficulties in defining and understanding the meanings of race; the nature of racism and oppression; Omi and Winant's theory of racial formation; the differing implications of slavery, colonization and immigration; the formation of stereotypes; unconscious racism and implicit bias; the gendered and sexualized nature of race; and the situation of biracial and multiracial persons.

This book also provides a rich historical introduction to the particular histories of four major groups of color in the United States, African Americans, Indians, Latinos/as, and Asian Americans, and their encounters with white Europeans and their descendants. Each of these minority groups has a long legal history documenting its presence and its attempts to use the courts and other means to fight racial discrimination in the United States. This legal history, much of which receives little treatment in mainstream discussions of race, seems to us essential in understanding the situation each of these groups confronts today. This history also enables comparisons among the experiences of these different groups.

Many discussions of race and racism in the United States focus solely on the experiences of racial minorities. It is just as important, in our view, to focus on the development of whiteness and the white race. Demonstrating the evolution of racial categories, membership in that race has changed over time for complex reasons. For example, Irish immigrants during the nineteenth century and European immigrants of the early twentieth century were, at first, considered nonwhite. Today, persons with such ancestry are considered White. How did this happen? Whiteness, the unstated norm of racial identity in the United States, requires close examination and study as does the role of wartime fervor in creating new demonized groups such as Muslims, Arabs, and South Asians.

Readers will notice that much seemingly unrelated law fits together when race and racism are used as organizing principles. The law of slavery and the ceaseless African-American struggle for civil rights are essential to understanding the development of doctrines of equality under the Constitution and statutory law. A different process—conquest, and its legal ratification by Congress and justification by the Supreme Court—is essential to understanding the racialization of Indians, Mexican Americans, and Puerto Ricans. Immigration law also plays a crucial role in the law of race. Supreme Court decisions upholding Chinese exclusion and alien land laws are central in producing the racialization of Asian Americans. And the Supreme Court's many determinations of who was white and who was not for purposes of naturalized citizenship were of crucial importance in defining the legal bounds of Whiteness. And developments in many standard areas of the legal curriculum, including family law, criminal procedure, poverty law, and trusts and estates, cannot be fully understood without reference to the twists and turns of racial fortune.

This book thus explores the themes of race and racism in a variety of doctrinal contexts. What is the meaning of racial equality? What understanding of racial equality finds expression in the crucial realms of education and voting rights? How do racial themes find expression in doctrines of freedom of speech? What are the popular images and stereotypes of people of color and Whites that pervade the media? How does race influence our understanding of sexuality and the family? And how does race intersect with crime?

This book makes it possible for readers to make these and other connections among race, history, and legal doctrine. Yet the task is not easy—reading about race and races requires us to think critically about the powerful and ingrained modes of thinking about and expressing racial ideas. Thus critical reading should guide your study of race:

1. **MAKE THE IMPLICIT EXPLICIT.** Look for the assumptions underlying discussions about race and state them. Many implicit assumptions, when made explicit, demonstrate their own inadequacy. Is one racial group being privileged over another? What unstated assumptions about gender, sexual orientation, wealth, or physical ability are part of discussions about race?
2. **LOOK FOR THE HIDDEN NORM.** What perspective is being universalized as the perspective for all people? Is that view really representative and objective? Is “the way things are” merely an excuse for perpetuating oppression?
3. **AVOID WE/THEY THINKING.** In a country that professes the ideal of democratic inclusion, consider the role of race in promoting or hindering that value. We/they thinking is usually designed to render some group outside the polis. Why does this happen and how often does it occur?
4. **REMEMBER CONTEXT AND SETTING.** People do not live in the abstract; they live situated lives. Examining the setting in which a problem arises may reveal levels of unsuspected complexity, but will also avoid facile solutions that fall into the traps listed above.
5. **SEEK JUSTICE.** Be skeptical of certain traditional lawyerly arguments to avoid change such as “the slippery slope,” the intent of the framers (who excluded from voting representation Indians, women of all colors, and African Americans, who counted only as property), or reliance on discriminatory precedent. Ask the question, “What is a just result that fosters democratic inclusion?”
6. **CONSIDER THE NATURE OF THE HARM.** Is it minimal or serious? Whose characterization rules? Be sure to listen to the voices of those most harmed.
7. **TRUST YOUR INTUITION.** As one writer put it: “[W]e must believe what our bodies tell us. They teach us to check for the deep, internal discomfort we feel when something is being stated as gospel but does not match our truth. Then they teach us how to spin that feeling out, to analyze it, to accept that it is true but to be able to show why that is so. They also teach us to be brave.” Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 Berkeley Women’s L.J. 16, 22 (1995).

8. ASK WHO BENEFITS? Practices, rules, and legal doctrines often benefit one group (usually the majority) at the expense of another. Ask yourself, why did this rule come about, and who benefits from it? If a rule turns out to be unfair, what prevents us from changing it?

This book offers tools, histories, and analysis for the study of race. No single volume, however, can begin to capture the full richness and varied experiences of race in a large, multiracial society like ours. Readers may wish to pioneer new forms and subjects of critical analysis to examine further themes we explore or mention. For example, how does race intersect with territorial status? How do race and racism play out in the history of insular peoples? With gays and lesbians? What is the intersection of race with class? Readers may want to examine issues of comparative and international law. How have other western, industrialized societies dealt with race and status questions, or with hate speech? What about non-European or non-industrialized societies? What do different world religions have to say about racial justice and social reform?

Much, then, remains to be done. In the hope that a comparative, historical, and politically engaged discussion of race can begin to illuminate what has been called—and what seems to remain—America's most intractable problem, we offer this book.

Juan F. Perea, Richard Delgado, Angela Harris, Jean Stefancic, Stephanie M. Wildman

Note on Nomenclature:

Given the complexities in the meaning and understanding of the words "race" and "racism," we thought it useful to outline briefly our reasons for the use of certain terms in our discussions of racial groups. Each term refers to a group that is "pan-ethnic"—composed of more or less distinct subgroups that may vary by origin, history, language, and culture, among other factors that constitute a people. Thus each term in fact refers to an aggregation of peoples who are more or less alike and different, in their own perception and in the perceptions of others. Readers should not lose sight of this complexity.

In referring to the various racial groups, we have chosen the following terms—"African American" or "Black," "Indian," "Latino/a," "Asian American," and "White"—because of their widespread usage and acceptance. We prefer "Latino/a" to "Hispanic" because it seems to us that the term "Hispanic" misleads by emphasizing the Spanish, European origins of the few conquerors who made their way to this continent, as opposed to the origins of a majority of persons who constitute the group to which the term refers, who are predominantly mixed, of indigenous and African ancestry. We have generally capitalized references to races by color, such as "Black" and "White," since these references typically function as proper names for their respective racial groups.

We have also, however, preserved as much as possible the original terms used in the excerpts quoted in this book out of fidelity to the original texts as well as to preserve the context, the sense of the time during which a piece was written, and the full meaning of the original sources.