
TABLE OF CONTENTS

| | |
|-----------------------|-------|
| ACKNOWLEDGEMENTS..... | V |
| PREFACE..... | VII |
| EDITORIAL NOTE..... | XI |
| TABLE OF CASES..... | XXIII |

Chapter 1. Slavery and the First Reconstruction: Establishing and Contesting the Racial Order..... 1

| | |
|---|----|
| I. Law and White Supremacy | 1 |
| II. Race, Slavery, and Judicial Power..... | 4 |
| Hudgins v. Wrights | 4 |
| Notes and Questions | 8 |
| Prigg v. Pennsylvania | 9 |
| Notes and Questions | 14 |
| Dred Scott v. Sandford..... | 15 |
| Notes and Questions | 31 |
| III. From Slavery, to Civil War, to Segregation | 31 |
| The Civil Rights Cases | 34 |
| Notes and Questions | 46 |
| Strauder v. West Virginia | 49 |
| Notes and Questions | 55 |
| Plessy v. Ferguson | 56 |
| Notes and Questions | 67 |
| IV. Colonialism, Immigration, and the Complexities of the Racial Order..... | 72 |
| A. Native Peoples and the Formation of the United States..... | 73 |
| B. Immigration, Citizenship, and Exclusion..... | 78 |
| Takao Ozawa v. United States | 81 |
| United States v. Bhagat Singh Thind..... | 84 |
| Notes and Questions | 88 |
| V. A Twentieth-Century Reckoning | 88 |
| Korematsu v. United States | 89 |
| Notes and Questions | 97 |

Chapter 2. Civil Rights, the Second Reconstruction, and the Ascendance of Colorblindness105

| | |
|---|-----|
| I. The Second Reconstruction | 107 |
| Hernandez v. Texas | 107 |
| Notes and Questions | 110 |
| A. The Road to Brown v. Board of Education | 111 |
| Brown v. Board of Education..... | 112 |
| Bolling v. Sharpe | 116 |
| Notes and Questions | 117 |
| B. The Civil Rights Movement and Congressional Action | 121 |
| Notes and Questions | 126 |

| | | |
|------|--|------------|
| C. | Anti-Miscegenation Laws and Segregation in the Private Sphere | 129 |
| | Loving v. Virginia..... | 129 |
| | Notes and Questions | 134 |
| II. | Implementing the Second Reconstruction and the Rise of Colorblindness..... | 135 |
| A. | Discriminatory Intent Versus Discriminatory Effects | 136 |
| | Washington v. Davis | 136 |
| | Notes and Questions | 141 |
| B. | Disparate Impact and the Civil Rights Statutes | 144 |
| | Notes and Questions | 145 |
| C. | The Case of Affirmative Action | 147 |
| | City of Richmond v. J.A. Croson Co. | 151 |
| | Notes and Questions | 161 |
| D. | The United States Census and the Changing Meanings of Race..... | 164 |
| | Notes and Questions | 168 |
| E. | Change and Continuity in the Racial Order | 171 |
| | Chapter 3. Intimacy and Child Placement | 175 |
| I. | Introduction..... | 175 |
| II. | Marriage and Intimate Coupling | 176 |
| | Notes and Questions | 179 |
| | Problems | 182 |
| III. | Child Placements | 184 |
| A. | Custody Determinations..... | 184 |
| | Palmore v. Sidoti | 184 |
| | Notes and Questions | 186 |
| | Applying <i>Palmore</i> | 187 |
| | Exercise..... | 191 |
| B. | Adoption and Foster Care of Black and Biracial Children..... | 192 |
| | Petition of R.M.G..... | 193 |
| | Notes and Questions | 204 |
| | Exercises | 205 |
| C. | The Race Matching Controversy | 206 |
| 1. | National Association of Black Social Workers Statement | 206 |
| | Notes and Questions | 208 |
| 2. | Evaluating Race Matching | 209 |
| | Exercise..... | 210 |
| 3. | The Multi-Ethnic Placement Act..... | 210 |
| 4. | 1996 Amendment, Interethnic Adoption Provisions | 213 |
| | Notes and Questions | 213 |
| D. | Personal Preferences Revisited | 218 |
| E. | The Placement of Indian Children..... | 220 |
| 1. | Tribal Jurisdiction..... | 222 |
| | Mississippi Band of Choctaw Indians v. Holyfield..... | 222 |

| | |
|---|------------|
| Notes and Questions | 227 |
| Exercise | 228 |
| 2. The Termination of Parental Rights | 229 |
| Adoptive Couple v. Baby Girl | 229 |
| Notes and Questions | 238 |
| Exercise | 239 |
| 3. Race and Sovereignty | 239 |
| Exercises | 241 |
| F. International Adoption | 243 |
| Chapter 4. Primary Education and Integration | 245 |
| I. Introduction | 245 |
| II. The Use and Limitations of Judicial Power to Promote Integration..... | 246 |
| Milliken v. Bradley (Milliken I) | 247 |
| Notes and Questions | 261 |
| Missouri v. Jenkins | 263 |
| Notes and Questions | 270 |
| Parents Involved in Community Schools v. Seattle School District No. 1 | 271 |
| Notes and Questions | 288 |
| III. Alternatives to Integration..... | 290 |
| A. The Pursuit of Equal Funding and Educational Adequacy..... | 291 |
| San Antonio Independent School District v. Rodriguez | 291 |
| Notes and Questions | 303 |
| B. Segregation 2.0: Within School Segregation | 305 |
| 1. Tracking | 305 |
| Exercise | 307 |
| 2. Disciplinary Referrals | 307 |
| Notes and Questions | 308 |
| Chapter 5. Higher Education | 311 |
| I. Formal Equality | 311 |
| II. Affirmative Action as Racial Remedy | 312 |
| Regents of the University of California v. Bakke | 313 |
| Notes and Questions | 328 |
| III. The Diversity Rationale..... | 330 |
| Regents of the University of California v. Bakke | 331 |
| Notes and Questions | 339 |
| A. The Re-Affirmation of Diversity..... | 339 |
| Grutter v. Bollinger..... | 340 |
| Notes and Questions | 349 |
| IV. The Means of Affirmative Action | 353 |
| Gratz v. Bollinger..... | 353 |
| Notes and Questions | 361 |
| Fisher v. University of Texas at Austin et al. | 364 |
| Notes and Questions | 368 |
| Fisher v. Texas | 370 |
| Notes and Questions | 374 |

| | | |
|---|---|------------|
| V. | Inter-Minority Conflict | 376 |
| | Students for Fair Admissions, Inc. v. Harvard College..... | 376 |
| | Notes and Questions | 394 |
| VI. | Rethinking Integration..... | 394 |
| | United States v. Fordice | 395 |
| | Notes and Questions | 404 |
| Chapter 6. Employment Discrimination | | 407 |
| I. | Introduction..... | 407 |
| II. | Two Theories of Discrimination: Treatment and Impact..... | 410 |
| | A. Disparate Treatment | 410 |
| | St. Mary's Honor Center v. Hicks | 411 |
| | Notes and Questions | 424 |
| | Hazelwood School District v. United States..... | 426 |
| | Notes and Questions | 435 |
| | B. Disparate Impact | 436 |
| | Griggs v. Duke Power Co. | 437 |
| | Notes and Questions | 440 |
| | Washington v. Davis | 443 |
| | Notes and Questions | 443 |
| III. | Conceptual Controversies over Race and Discrimination | 443 |
| | A. Immutable Traits: Ancestry and Color | 443 |
| | Saint Francis College v. Al-Khazraji | 444 |
| | Notes and Questions | 447 |
| | B. Conduct: Accent and Language..... | 449 |
| | Chaline v. KCHO | 450 |
| | Notes and Questions | 454 |
| | Garcia v. Spun Steak Co..... | 457 |
| | Notes and Questions | 462 |
| | C. Cultural Performance and Intersectionality | 463 |
| | Rogers v. American Airlines | 464 |
| | Notes and Questions | 468 |
| | Lam v. University of Hawai'i | 469 |
| | Notes and Questions | 471 |
| | D. Affirmative Action..... | 472 |
| | Morton v. Mancari..... | 473 |
| | Notes and Questions | 478 |
| | Dix v. United Air Lines..... | 480 |
| | Notes and Questions | 484 |
| IV. | The Uncertain Future of Disparate Impact Claims (and Affirmative Action) | 486 |
| | Ricci v. DeStefano | 486 |
| | Notes and Questions | 499 |
| Chapter 7. Policing | | 503 |
| I. | Introduction to Race and Criminal Justice | 503 |
| II. | Policing | 505 |
| | A. Introduction..... | 505 |

| | | |
|--|---|------------|
| B. | Approach One: Require Specificity in Crime Definition..... | 507 |
| | Drafting Exercise | 511 |
| | Chicago v. Morales | 512 |
| | Notes and Questions | 527 |
| C. | Approach Two: Require Objective Evidence of Criminality | 531 |
| | 1. <i>Terry v. Ohio</i> and Stop and Frisk..... | 531 |
| | 2. Use of Race and Racial Profiling | 535 |
| | United States v. Brignoni-Ponce | 535 |
| | Notes and Questions | 542 |
| | 3. Pretextual Investigations | 551 |
| | Whren v. United States | 551 |
| | Notes and Questions | 556 |
| D. | Approach Three: Prohibit Subjective Racial Motivation | 559 |
| | Commonwealth v. Lora | 559 |
| | Notes and Questions | 570 |
| E. | The Puzzle of Race-Based Suspect Descriptions | 576 |
| | Brown v. City of Oneonta | 576 |
| | Notes and Questions | 582 |
| F. | Concluding Notes on Race and Policing | 587 |
| Chapter 8. Criminal Trial and Punishment..... | | 589 |
| I. | Introduction..... | 589 |
| II. | Prosecutorial Charging..... | 590 |
| | United States v. Armstrong | 591 |
| | Notes and Questions | 599 |
| III. | Jury Selection..... | 606 |
| | A. Selecting the Venire for Grand and Petit Juries..... | 607 |
| | Hernandez v. Texas..... | 608 |
| | Notes and Questions | 608 |
| | Notes on the Fair Cross Section Requirement | 610 |
| | B. Voir Dire | 616 |
| | Turner v. Murray | 617 |
| | Notes and Questions | 625 |
| | C. Peremptory Challenges..... | 627 |
| | Batson v. Kentucky | 628 |
| | Notes and Questions | 639 |
| IV. | Punishment | 647 |
| | A. The Death Penalty | 647 |
| | McCleskey v. Kemp..... | 648 |
| | Notes and Questions | 669 |
| | B. Crack-Powder Sentencing Disparity..... | 674 |
| | United States v. Clary | 675 |
| | Notes and Questions | 684 |
| Chapter 9. Free Expression | | 691 |
| I. | Introduction..... | 691 |
| II. | Racist Speech | 694 |
| | A. The Harm of Racist Speech: The Victim's Perspective | 694 |
| | B. What Is Racist Speech?..... | 696 |

| | | |
|--|---|------------|
| C. | Promoting Civil Rights Through the First Amendment..... | 702 |
| | Yñiguez v. Arizonans for Official English | 705 |
| | Notes and Questions | 712 |
| D. | Custom, Social Sanction, and Hate Speech..... | 714 |
| III. | Why Free Speech: The Doctrine and Its Justifications | 716 |
| | Brandenburg v. Ohio | 719 |
| | Notes and Questions | 721 |
| | Collin v. Smith | 722 |
| | Notes and Questions | 728 |
| IV. | Hate Crimes | 729 |
| | R.A.V. v. City of St. Paul | 731 |
| | Notes and Questions | 736 |
| | Wisconsin v. Mitchell..... | 738 |
| | Notes and Questions | 742 |
| | Virginia v. Black | 745 |
| | Notes and Questions | 757 |
| V. | Racist Symbols | 759 |
| | Walker v. Texas Division, Sons of Confederate Veterans, Inc. | 760 |
| | Notes and Questions | 767 |
| VI. | Conclusion | 776 |
| Chapter 10. Voting Rights and Electoral Participation | | 779 |
| I. | Introduction..... | 779 |
| II. | Protecting Voting as an Individual Right | 782 |
| A. | Remedying Racial Discrimination in Voting..... | 782 |
| | South Carolina v. Katzenbach..... | 782 |
| | Notes and Questions | 792 |
| B. | Constitutional Limits..... | 795 |
| | Rice v. Cayetano..... | 796 |
| | Notes and Questions | 810 |
| C. | The End of the Second Reconstruction? | 811 |
| | Shelby County, Alabama v. Holder..... | 812 |
| | Notes and Questions | 828 |
| III. | Voting as a Group Right | 830 |
| A. | Vote Dilution | 830 |
| | Thornburg v. Gingles | 832 |
| | Notes and Questions | 844 |
| B. | Constitutional Limits on Racial Representation | 847 |
| | Shaw v. Reno | 848 |
| | Notes and Questions | 860 |
| C. | Inter-Minority Conflict and Coalition..... | 868 |
| | Johnson v. De Grandy..... | 868 |
| | Notes and Questions | 877 |
| D. | Race and Political Structure | 879 |
| | Schuette v. Coalition to Defend Affirmative Action | 880 |
| | Notes and Questions | 900 |

IV. Who Still Can't Vote 902

A. Ex-Felon Disenfranchisement 903

Richardson v. Ramirez 903

Notes and Questions 914

B. Voter Identification Requirements: The New Denial of the
Vote?..... 917

Crawford v. Marion 917

Notes and Questions 928

C. Territoriality and Citizenship 932

Igartua De La Rosa v. United States 933

Notes and Questions 934

Appendix of Constitutional and Statutory Law941

Declaration of Independence..... 941

United States Constitution 941

Antebellum State Laws Regarding Slavery 942

Corwin Amendment..... 942

Emancipation Proclamation..... 943

Freedmen's Bureau Bill..... 944

Second Freedmen's Bureau Bill..... 946

Civil Rights Act of 1866..... 950

Reconstruction Amendments 953

Thirteenth Amendment (1865) 953

Fourteenth Amendment (1868)..... 953

Fifteenth Amendment (1870) 954

Civil Rights Act of 1870..... 954

Civil Rights Act of 1871 955

Civil Rights Act of 1875..... 959

Civil Rights Act of 1964 as Amended 960

Voting Rights Act of 1965 as Amended 967

Civil Rights Act of 1968 (Fair Housing Act)..... 976

INDEX 987