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The Law of Discrimination: Cases and Perspectives

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MATTHEW  BENDER

Dedication

For Whitney and Courtney
— R.L.B.

For the best I saved for last, Iryna, the love of my life
— G.P.C.

For Fiona and Seamus
— M.S.

Preface

This casebook’s major pedagogical objective is to guide students through the increasingly complex field of discrimination cases and doctrine, and to offer a diversity of perspectives that underpin or challenge the canon. To that end, the casebook facilitates a broad inquiry into discrimination law. While most of the seminal cases included in this casebook, like most civil rights casebooks, involve discrimination based on race, we discuss protections for other classes, including women, language minorities, older workers, and the disabled. Affirmative action, an important component of discrimination law, is also covered extensively in this casebook. In addition, several perspectives on discrimination law are presented. These perspectives offer students insights into intellectual frameworks that shape opinions and doctrines. They also provide students with conceptual tools for challenging received traditions in discrimination law — “thinking outside the box.” In sum, this casebook covers more ground than the typical civil rights casebook.

The casebook’s ten chapters are suitable for a two- to four-credit course. Chapter 1 introduces historical and contemporary perspectives on discrimination law. It opens by raising new as well as recurring themes reflected in modern discrimination law, including questions of race vs. class, racial identity, racial integration vs. racial separation, and the extent to which all racial minorities face the same race problem. Formal equal opportunity, which is the nation’s current civil rights policy, and its predecessor civil rights policies are examined. The chapter ends with a presentation of both liberal and oppositional civil rights perspectives in contrast to formal equal opportunity. Chapter 1 sets the stage for a sophisticated and enlivened discussion of discrimination law.

The remaining nine chapters are case-oriented and deal with specific areas of discrimination. Each begins with an overview of the relevant social environment and doctrinal framework. The principal cases are presented with a minimum of editing, retaining important concurring or dissenting opinions, to facilitate sophisticated classroom discussion or rôle-playing in which students argue cases in class. These cases also contain in brackets the pagination of their official reporters. This permits students, when they become lawyers doing research, to cite to the official reporters without having to turn on the computer.

Chapter 2 focuses on the paradigm of discrimination law — discrimination in the context of education. Constitutional cases from the period of separate but equal education to the landmark *Brown* case and other major desegregation cases develop the theme of establishing liability for denials of equal educational opportunity. Desegregation litigation is bifurcated into the constitutional mandate for desegregation and the scope of desegregation relief. Statutory facets of liability (Title VI for race, Title IX for gender) are discussed in the last part of this chapter.

Chapter 3 first addresses the law of public accommodations, an historical dimension of separate but equal that continues in some settings today. Fair housing is then discussed from many different legal perspectives, encouraging students to think broadly about approaches to housing-related problems. Not only is discrimination in the rental and sale of housing discussed under several statutes, but related issues of financing and credit are included with reference to the Community Reinvestment Act and the Equal Credit Opportunity Act. Social problems arising in the housing context are considered under alternative litigation strategies that originate from state constitutional theories, from the burgeoning phenomenon of homelessness, and result in “integrated litigation” (novel approaches considering multiple or hybridized approaches as creative solutions to housing discrimination) are additional topics presented in Chapter 3.

Employment discrimination receives comprehensive treatment in Chapter 4 as well as elsewhere in

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the book. Indeed, considering the discussion of the many aspects of employment discrimination in Chapter 4, Chapter 8 (The Rights of Language Minorities), Chapter 9 (The Rights of People with Disabilities), and Chapter 10 (Affirmative Action), the book may be easily adapted to a course on Employment Discrimination Law. Chapter 4 itself has as its primary focus Title VII of the Civil Rights Act of 1964 (as amended) and includes treatment of procedure, remedies, coverage, and theories of discrimination under that statute. A discussion of other statutory bases of employment discrimination litigation, such as Sections 1981 and the Age Discrimination in Employment Act, are also included.

The right to vote is the focus of Chapter 5. Constitutional claims under the Fourteenth and Fifteenth Amendments as well as statutory litigation under the 1957 and 1960 Civil Rights Acts and §§ 2 and 5 of the Voting Rights Act of 1965 (as amended) are discussed. Issues that have engendered some controversy in recent years, such as racial redistricting and the extension of the Voting Rights Act, are also considered.

Discrimination in the administration of justice is an increasingly troublesome area of law that seems to fall through the cracks in many fields of study, including civil rights. Chapter 6 highlights discrimination in custody, arrest, prosecution, jury selection, and sentencing. Another complex and very important issue included in the chapter is the intersection of free speech rights and equality concerns, as manifested in the regulation of hate crimes and hate “speech.”

Constitutional torts is the main topic of Chapter 7. Related issues of state action, immunity, and abstention are discussed here in the context of 42 U.S.C. § 1983. Also included in this chapter is treatment of the law of attorneys’ fees for civil rights actions generally and a review of civil penalties under 42 U.S.C. § 1985(3).

Discrimination based on ethnicity has some of its own unique dimensions. These are explored in Chapter 8. The rights of language minorities and immigrants arise in the context of bilingual education, employment discrimination, arrest, housing, voting rights, and bilingual ballots based on foreign accent, alienage, ancestry, citizenship status, and national origin. Additionally, we highlight litigation strategies for the purpose of encouraging students to think creatively about legal theory (“integrated litigation”).

Discrimination law for disabilities has taken on added significance with the enactment of the Americans with Disabilities Act of 1990. Chapter 9 covers the evolution of legal thinking in this area, from the eugenic perspective of *Buck v. Bell* and the constitutional theory of the *Cleburne* case to the various statutory bases of liability.

Finally, chapter 10 addresses the thorny issue of affirmative action. Voluntary and involuntary affirmative action programs created under both statutory (particularly Title VII) and constitutional norms are discussed. The chapter ends with an exploration of alternatives to traditional race-based affirmative action.

We wish to thank our research assistants and other students who helped with citations and other tedious details: Lauren Hargrove, Arine Harapeti, Allegra Keeney, Elyse Anne Fune, and Michael R. Laisne, all of the Class of 2012 at the University of San Diego School of Law; Jacey L. Liu, J.D., Class of 2010, Joseph R. Schoser, J.D., Class of 2009, Michael Bauer, LL.M., Class of 2010, and Katherine S. Silva, Class of 2010, all graduates of Willamette University College of Law; and Lesley Fredin, Alexa Santora and Evan Sheets, all of the Class of 2011 at George Washington University School of Law. We also wish to acknowledge the contributions of the Honorable Gordon A. Martin, Jr., who assisted with the initial formulation of some of the materials on voting, administration of

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