SEX-BASED DISCRIMINATION

TEXT, CASES AND MATERIALS

Sixth Edition

Herma Hill Kay
Martha S. West

American Casebook Series®

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SEX-BASED DISCRIMINATION

Sixth Edition

By

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Foreword

As the sixth edition of these materials goes to press, Justice Sandra Day O'Connor has announced her resignation, but remains on the Court awaiting the confirmation of her successor. She was credited with being "in control" of the Court because the frequent four to four division of its liberal and conservative wings made hers the "fifth swing vote" which determined the direction of the law in many cases. Her departure will be felt in all areas of the law. In no area will her absence be more significant than that of sex-based discrimination. In recognition of her many contributions to this field, the authors respectfully dedicate this edition to Justice O'Connor.

In the first edition of these materials, the authors recognized that "[s]ex-based discrimination is a product of culturally defined roles for men and women." We nevertheless decided against adopting a cultural focus for our work, explaining that "we believe that, as an initial device, the law is likely to be more effective as an aid in opening arenas for personal action." We also decided to present the cases in a lightly edited format, "in order to preserve the context of the reasoning, of particular significance in decisions of the United States Supreme Court." Later editions confirmed both choices, with the Preface to the fourth edition noting that "the United States Supreme Court's attitude toward equality between women and men, while always important, is critical to the development of the law in this area."

When the first edition appeared in 1974, the United States Supreme Court was composed entirely of men. Describing her strategy in litigating the path-breaking 1970s sex discrimination cases before that body of nine men, then-Professor Ruth Bader Ginsburg explained that the "Court needed basic education before it was equipped to turn away from the precedents in place," (Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s,* 1989 U. Chi. Legal F. 9, 11.) Her instruction led to the Court's creation of an intermediate standard for the adjudication of constitutional claims of sex discrimination. (Craig v Boren, 1976, p. 38). In 1981, when Justice Sandra Day O'Connor took her seat as the Court's first woman, a more receptive bench for these claims was put in place. During her first Term, Justice O'Connor laid the foundation for a more searching inquiry into these matters, emphasizing that the question "whether classifications based upon gender are inherently suspect" (Mississippi University for Women v. Hogan, 1982, p. 918) remained open. Justice Ruth Bader Ginsburg joined the Court in 1993, and in her first published opinion reiterated O'Connor's point that the final word on the constitutional standard in sex discrimination cases had not yet been written (Harris v. Forklift Systems, Inc., 1993, p. 766, concurring opinion). Many of the opinions of both women Justices appear throughout these pages. To be sure, they were not always on the same side, or if on the same side, not always for the same reasons in any given case, but often their opinions provide an identifiably different way of approaching the issues.

Unlike Justice Ginsburg, whose sustained advocacy in the 1970s helped show the Court a new approach to the meaning of equality between men and women, Justice O'Connor was not seen as a feminist when she joined the

Court in 1981. As she departs, however, her progressive mark on this body of law is plain for all to see. Sex-based discrimination cases were among the first (*Hogan*, 1982, p. 918) and the last (Jackson v. Birmingham Board of Education, 2005, noted p. 959) that she wrote for the Court during her tenure. She and Justice Ginsburg joined in articulating the new heightened "skeptical scrutiny" standard for constitutional challenges to claims of sex discrimination that Justice Ginsburg announced in a remarkable 7-1 decision (United States v. Virginia, 1996, p. 71) (citing *Hogan* for the "core instruction" that "[p]arties who seek to defend gender-based government action must demonstrate 'an exceedingly persuasive justification' for that action."). Of the many subjects within the area of sex-based discrimination in which Justice O'Connor's leadership has been exercised, two stand out: her interpretation of Title IX's ban on sex discrimination in public schools, and her development of the "undue burden" test in abortion cases. In both these subjects, her methodology may have been as important as her conclusions in the evolution of her judicial consciousness, for the techniques she used in deciding cases are characteristic of common law adjudication.

Justice O'Connor's path, like that taken by the common law judges with whom she once sat in Arizona, was an incremental one. She made her way cautiously, case by case, grounding her approach in the factual context of each problem. The Title IX cases show her methodology most clearly. Building on the Court's determination that an implied private cause of action exists under Title IX (Cannon v. University of Chicago, 1979, noted p. 958), Justice O'Connor used the techniques of common law judges to articulate the contours of that private cause of action in a series of cases. First she joined a unanimous Court in concluding that a damages remedy is available for actions brought to enforce Title IX (Franklin v. Gwinnett County Public Schools, 1992, noted p. 959). Then she authored a series of cases in which the Court held that a school district could be liable in damages for the sexual harassment of a student by a teacher (Gebser v. Lago Vista Independent School District, 1998, p. 960); extended that liability to include "student-on-student" peer harassment (Davis v. Monroe County Board of Education, 1999, p. 971); and held that Title IX encompassed a claim for retaliation against an individual who had complained about sex discrimination (Jackson v. Birmingham Board of Education, 2005, noted, p. 959).

Justice O'Connor's common law methodology is appropriate in the statutory context where Congress is free to alter, let stand, or enact the Court's interpretative innovations. But Justice O'Connor did not limit her approach to statutory interpretation. She used a similar approach to constitutional interpretation, thus creating a common law of the Constitution that explicates its text. The abortion cases, where she developed the "undue burden" standard to replace the trimester framework set out in *Roe* v. *Wade*, 1973, p. 475, illustrate her approach. The term itself was first used by Justice Blackmun in Bellotti v. Baird, 1976, noted p. 535, in upholding a written consent requirement placed on a woman prior to undergoing a surgical abortion procedure during the first twelve weeks of her pregnancy. Justice O'Connor invoked it in a dissenting opinion in which she suggested that "this 'unduly burdensome' standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular 'stage' of pregnancy involved." (Akron v. Akron Center for Reproductive Health, 1982)

(invalidating an informed consent provision and an accompanying 24-hour waiting period). She relied on it again in an opinion concurring in part and concurring in the judgment in Hodgson v. Minnesota (1990) (striking down a two-parent consent requirement for a minor's abortion subject to a bypass procedure). Two years later, she used it to garner a plurality of the Court in support of the proposition advanced in her *Akron* dissent: that the trimester framework should be replaced with the "undue burden" standard (Planned Parenthood of Southeastern Pennsylvania v. Casey, 1992, p. 484). The Court adopted that proposition in its 5-4 paradigm-shifting case striking down a Nebraska statute prohibiting particular abortion procedures because the statute placed an undue burden on the woman's right to choose to terminate her pregnancy, and because it lacked a health exception (Stenberg v. Carhart, 2000, noted p. 546).

Justice O'Connor's common law approach in the abortion cases was more controversial than in the statutory setting. As Professor Jesse Choper has pointed out, because Congress cannot directly alter the Court's constitutional determinations, a non-elected, life-tenured judge's discretionary mode of interpretation can be seen as fundamentally inconsistent with our democratic majoritarian philosophy. (Judicial Review and the National Political Process, 1980). Nonetheless, if one is willing to accept the proposition that one role of the Supreme Court is to protect the members of "discrete and insular minorities" against prejudice by the majority, as claimed by Justice Stone in footnote 4 of United States v. Carolene Products Co. (1938), then in our view this role should and does permit the Court to develop a common law of the Constitution. Unquestionably, Justice O'Connor has been this role's leading modern exponent. When one adds to that observation the knowledge of her own personal experience of discrimination against women in the workplace, her emergence as a jurist with a special aptitude for removing obstacles that limit individual achievement on the basis of sex is not surprising.

What one common law judge has done can be undone, or taken in a different direction by another judge, subject always to the constraint of *stare decisis*. In this connection, Justice O'Connor's pointed recognition in her opinion for the Court in *Casey* of the precedential impact of *Roe* assumes additional importance for the future. She noted that "[a]n entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions," and concluded that this observation supported affirming, rather than overruling, "*Roe*'s central holding." As we await the inevitable reconsideration of *Carhart* and other cases decided 5-4 by "the O'Connor Court," we are grateful that Justice Ruth Bader Ginsburg remains a potent and articulate voice for equality between the sexes.

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Authors' Note and Acknowledgements

This Sixth Edition continues the practice of earlier Editions in presenting lightly edited cases in order to preserve the flavor of judicial reasoning about sex differences and their relevance in the context of Constitutional and statutory challenges to differential treatment of women and men. The Text Notes are intended to provide relevant background material that can serve as the basis for more general discussion.

We gratefully acknowledge the permission extended by the authors and publishers of copyrighted works excerpted in the First, Second, Third, Fourth, and Fifth Editions, as well as in this Sixth Edition. Specific acknowledgements are found in the Acknowledgements and Permission section.

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*

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