

1989

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### Recommended Citation

Warren D. Rees, *Book Review: Government Discrimination: Equal Protection Law and Litigation*, 7 LAW & INEQ. 147 (1989).

Available at: <http://scholarship.law.umn.edu/lawineq/vol7/iss1/7>

*Law & Inequality: A Journal of Theory and Practice* is published by the  
University of Minnesota Libraries Publishing.

## BOOK REVIEW

### Government Discrimination: Equal Protection Law and Litigation

by James A. Kushner\*

New York: Clark Boardman Company, 1988

Reviewed by Warren D. Rees\*\*

A definition of the elusive concept of equality has challenged the best minds for centuries.<sup>1</sup> Implementation of equality within society has proved to be just as difficult to obtain. The equal protection clause of the fourteenth amendment was one of several attempts to create equality within the United States where inequality was the rule. It was ineffective, however, until the middle of the twentieth century when the courts reversed decades of cases that took an extremely narrow view of the equal protection clause.<sup>2</sup> While not the only effort to implement equality,<sup>3</sup> the equal protection clause became one of the most important elements in that struggle in the United States.<sup>4</sup> Despite the significance placed upon the equal protection clause by twentieth century judicial interpretation, no source dealt exclusively with the jurisprudence of the equal protection clause until Kushner's book, *Government Discrimination*.

The fact that *Government Discrimination* is the only source to deal exclusively with the equal protection clause means nothing by itself; several other sources cover the equal protection clause, in

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1. See Polyvios Polyviou, *The Equal Protection of the Laws* 5-24 (1980).

2. See Robert Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights 1866-1876*, at 155 (1985).

3. The thirteenth and fifteenth amendments and several federal statutes were enacted to promote equality. 1 Joseph Cook & John Sobieski, Jr., *Civil Rights Actions* § 1.17, at 1-157 (1987).

4. 2 Ronald Rotunda, John Nowak & J. Nelson Young, *Treatise on Constitutional Law* § 18.1, at 314 (1986) [hereinafter Rotunda].

addition to other constitutional material.<sup>5</sup> The important questions are 1) whether *Government Discrimination* provides a service that is useful to those interested in the jurisprudence of the equal protection clause and 2) whether it provides anything that is not available in the other sources on the subject. To answer these questions it is useful to compare *Government Discrimination* with the type of source one might ideally like to have on the subject of equal protection,<sup>6</sup> as well as the sources that already exist on the subject.<sup>7</sup> This analysis will demonstrate the strengths and limitations of *Government Discrimination*, and will place it in the context of the other sources available.

When evaluating any source it is important to consider the author's qualifications to write on the subject. The ideal source would be written by someone with practical and theoretical knowledge on the subject. In the case of *Government Discrimination*, the author's experience, research, and other writings demonstrate his qualifications to produce this work. James Kushner, professor of law at Southwestern University School of Law, has written extensively in the area of housing discrimination and related matters.<sup>8</sup> He has been a legal consultant to the National Urban League of Canton, Ohio and a project attorney with the National Housing Law Project at Berkeley, California.<sup>9</sup> He teaches constitutional law, housing and community development, and land use planning.<sup>10</sup>

The timeliness of the source is another important considera-

5. The major sources that contain extensive discussion of the equal protection clause are Laurence Tribe, *American Constitutional Law* § 16-1 to 16-59 (1988); Rotunda, *supra* note 4, § 18.1-18.46; and Polyvius, *supra* note 1. Many other sources contain some material on equal protection but only in the context of a discussion about the laws regarding a specific type of discrimination, e.g., Charles Richey, *Manual on Employment Discrimination Law and Civil Rights Actions in the Federal Courts* § D-1 (Rev. ed. 1986).

6. There is no single source that exhaustively covers the equal protection clause. The ideal source in this review is based solely on what such a source might contain.

7. This review will compare *Government Discrimination* with the sources listed in note 5.

8. Examples of some of his writings include: *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Segregation in the United States* (1980); *Fair Housing: Discrimination in Real Estate, Community Development, and Revitalization* (1983 & Supp. 1987); *Non-owner Rights in Real Property and Their Impact on Property Taxes*, 7 Urb. L. & Pol'y 333 (1985); *Urban Transportation Planning*, 4 Urb. L. & Pol'y 161 (1981); *Toward the Central Meaning of Religious Liberty: Non-Sunday Sabbatarians and the Sunday Closing Cases Revisited*, 35 Sw. L.J. 557 (1981).

9. Association of American Law Schools, *Directory of Law Teachers 1987-88*, at 497 (1988).

10. *Id.*

tion. The ideal source on the equal protection clause would be available when equal protection is a significant factor in the promotion of equality and it would be current, discussing the most recent developments in the field. It is ironic that the first book dedicated solely to the jurisprudence of the equal protection clause comes at a time when the courts are refusing to expand, and are to some extent reversing, their interpretation and use of the equal protection clause to invalidate state legislation.<sup>11</sup> Plaintiffs are turning to other federal and state laws to challenge discriminatory laws and practices.<sup>12</sup> Despite the limitations placed upon it by the courts' interpretation, the equal protection clause remains an important part of the total package of laws designed to rid society of discrimination. For this reason the subject still deserves detailed treatment and Professor Kushner's book is a timely source for this treatment.

*Government Discrimination* may also be considered a timely work since the present decline in the use of equal protection provides a good opportunity to assess the scope and meaning of the initial application of the equal protection clause and what the future might bring. Professor Kushner's book is helpful for determining the current status of equal protection, but he does not provide much analysis about whether the courts will expand or restrict the scope of the equal protection clause in the future.

*Government Discrimination* is also timely because it is current in its coverage of case law and other relevant references. The present version covers cases and materials up to 1987. It is published in a looseleaf format which will make updating easy and quick by simply replacing the pages containing the old material with pages containing the new material. Updates are planned for the work but their frequency is not specified. Annual updating is the normal pattern for works of this type. If this pattern holds true for *Government Discrimination* it will be no more current in its coverage than Rotunda's *Treatise on Constitutional Law: Sub-*

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11. This is evidenced by the refusal of the Burger Court to expand the list of fundamental rights and the retreat from classifying legitimacy as a suspect classification in *Mathews v. Lucas*, 427 U.S. 495 (1976), and by requiring that plaintiffs prove discriminatory intent rather than just disparate impact in *Washington v. Davis*, 426 U.S. 229 (1976). See also Charles Harr & Daniel Fessler, *The Wrong Side of the Tracks* 43-53 (1986) (which examines these developments during the Burger Court).

12. See James Kushner, *Government Discrimination: Equal Protection Law and Litigation* § 1.07 (1988). State constitutional law has increased in importance because of the retreat in federal equal protection. Federal civil rights laws are also important since many of them require only proof of disparate impact rather than actual intent to establish a prima facie case. See Kushner, *supra*, § 3.01, at 3-2 n.4.

*stance and Procedure*, which is updated by annual pocket parts and is the most current of the major sources on the equal protection clause.<sup>13</sup>

The intended user of the source is also an important consideration. The ideal source would be one that can be utilized effectively by the scholar and the practicing attorney. Although the audience for whom *Government Discrimination* was intended is never explicitly stated, attorneys litigating claims based on the equal protection clause will benefit most from this work. It is organized according to the arguments of the plaintiff and defendant in equal protection litigation. In the major part of the work the author first considers the requirement of state action and the conditions under which the courts have found a state action sufficient to satisfy the equal protection clause. The work then proceeds to consider the challenger's prima facie case under the equal protection clause. Once the plaintiff has established the prima facie case, the burden of going forth with the case is shifted to the defendant, which is the next part of Kushner's book. The book explains the different levels of scrutiny the court may apply. The final section covers the remedies available to the successful plaintiff in an equal protection case.

The intended audience is also evident from the way the material is treated. Each section of the book begins with an overview of the specific aspect of equal protection followed by a more detailed discussion of the relevant cases. The discussion is not as detailed as one might find in a work intended for scholarly research. It deals primarily with brief descriptions of relevant cases woven into narrative form. The format and depth of discussion is very similar to a law review article that is designed to provide an overview of the law.

The organization, material included, and depth of treatment all support the conclusion that this source will be most useful to attorneys who are litigating claims under the equal protection clause and other researchers who want an overview with just enough detail to understand the subject. In this regard *Government Discrimination* is unique among the other major sources on equal protection.<sup>14</sup>

While the author's qualifications, the source's timeliness, and the intended audience are important, the book's content is the

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13. Rotunda, *supra* note 4.

14. Tribe, *supra* note 5 and Rotunda, *supra* note 4, are arranged by types of discrimination and the level of scrutiny used for each type. Polyvius, *supra* note 1, is arranged by the levels of scrutiny. All three contain more detail in their analysis than Kushner.

most important consideration when evaluating that source. The ideal source's content would include substantial sections on the theoretical background of equal protection. This would include the definitions and theories of equality that are important for any interpretation of equal protection. Also included would be material on the history of the equal protection clause, the substantive aspects of the clause as interpreted by the courts, and the relationship between the equal protection clause and other statutes. While *Government Discrimination* does contain sections on the theoretical concept of equality and the history of the equal protection clause, these sections are very brief and are useful only for the most general overview. The author does refer to the major sources on the concept of equality and the history of the equal protection clause in extensive footnotes.<sup>15</sup>

The majority of *Government Discrimination* deals with the substantive aspects of equal protection. It devotes a chapter to each of the major parts of a cause of action under the equal protection clause: the discriminatory law or action must originate with the state, the plaintiff must prove intent to discriminate, and the level of scrutiny to which the state action will be subjected must be determined. Each chapter discusses and synthesizes the major cases interpreting the equal protection clause with cites to most, if not all, relevant cases.

The book begins with an examination of the state action requirement.<sup>16</sup> This section focuses on those occasions when discriminatory actions of private individuals or organizations are considered actions of the state for equal protection purposes. If a private person carries out a function traditionally associated with the government, the "public function" model, or if a private person acts in partnership with government, the "entanglement" model, that person's action will be considered an action of the state. The author examines each situation where the courts have applied either the public function or entanglement model. There is also a brief treatment of the application of equal protection requirements to the federal government by the fifth amendment's incorporation

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15. For discussion about the meaning of equality and the history of the equal protection clause one must look to books and articles written specifically about those subjects. None of the major sources on equal protection contain much material on these two subjects. For relevant sources see those referenced in Kushner, *supra* note 12, and law review articles found in LegalTrac under the subject heading "Equality Before the Law." LegalTrac is an index to legal periodical literature covering the years 1980 to the present. For articles written before 1980 consult Index to Legal Periodicals.

16. Kushner, *supra* note 12, § 2.01-2.03(18).

of the fourteenth amendment's equal protection standard.<sup>17</sup>

The author then considers the plaintiff's prima facie case in a discrimination action under the equal protection clause.<sup>18</sup> This deals primarily with the question of discriminatory intent, which is a requirement of the equal protection clause. The major part of the chapter examines the various types of evidence accepted by the courts to prove intent.

Assuming that the plaintiff is able to establish a prima facie case, the defendant has the burden of going forward with the case by either disproving the intent or by justifying the discrimination by a valid reason.<sup>19</sup> This stage is critical for both parties since the level of scrutiny to be applied determines the defendant's chances of justifying the discrimination. The author discusses each level of scrutiny: the rational basis test, the mid-range important government interest test, the rationality plus test,<sup>20</sup> and the strict scrutiny test. The author examines the relevant cases under each level of scrutiny and attempts to draw the line between valid and invalid legislation or action at each level. He then examines the classifications and fundamental rights which usually invoke the strict level of scrutiny.<sup>21</sup>

In its final section the book deals with the remedies available to the plaintiff who is successful in an equal protection claim.<sup>22</sup> These include the remedies of desegregation and affirmative action and those remedies available through federal civil rights legislation.<sup>23</sup> Generally, the content of *Government Discrimination* is not unique in the material covered, nor is the treatment as detailed as the other sources on the equal protection clause.

Besides the content of the book, the number of references to other useful sources is also important. The ideal source would be exhaustive in its reference to other relevant sources available on the subject. *Government Discrimination* provides references to more sources than any other work on the subject of equal protection. Throughout the entire work there are numerous references to relevant case law and secondary sources, such as treatises and

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17. *Id.* at § 2.04.

18. *Id.* at § 3.01-3.05.

19. *Id.* at § 4.01.

20. This level of scrutiny, which is not clearly established by the courts, requires the legislature to actually articulate a valid purpose rather than the state merely identifying a possible valid interest. *Id.* at § 4.05.

21. *Id.* at § 5.01-6.08.

22. *Id.* at § 7.01-9.06.

23. Detailed sources on federal civil rights legislation include Cook & Sobieski, *supra* note 3 and Ivan Bodensteiner & Rosalie Berger Levinson, *State and Local Government Civil Rights Liability* (1987).

law review articles. It is an exhaustive digest on equal protection case law containing citations to approximately 3,200 cases. It is also a comprehensive subject index to books and articles containing references to 127 different books and 735 law review articles on the subject. For this reason the book is valuable to the constitutional scholar or anyone wanting to research an equal protection issue in depth.

Finally, any source is nearly useless if it is not written and organized in an understandable manner. *Government Discrimination* is well written; it is concise and understandable. Its organization and style of writing permits the reader to gain a quick overview of the subject and allows one to research easily any specific area of the equal protection clause. In terms of clarity and organization, it is the best of all the sources which deal extensively with the equal protection clause.

*Government Discrimination*, despite its lack of detailed and scholarly discussion, is a valuable contribution to the literature available on the subject of equal protection. While its organization makes it primarily useful to the practicing attorney, the extensive references to other sources makes it useful to the scholar. The style of writing, timeliness, and content of *Government Discrimination* makes it a helpful guide to equal protection law. Assuming it is kept current, it should continue to be a useful source on the jurisprudence of the equal protection clause.

