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Book Reviews—

READINGS ON EQUAL EDUCATION: VOLUME 15. RACE, THE COURTS AND EQUAL EDUCATION: THE LIMITS OF THE LAW.

Edited by Richard Fossey. New York, AMS Press. May, 1998. 262 pages. \$62.50.

*Reviewed by Alan T. Kolling **

Few social issues are as compelling as the role that race has played and continues to play in the development of the American educational system and in defining who has access to it. As affirmative action practices come under increasing attack through the state initiative process, a new study by the former presidents of Harvard and Princeton universities, purporting to show that race-sensitive admissions policies have achieved the goals of providing increased opportunities for Black students and promoting multiracial interaction on campuses around the country, has served only to escalate the debate.

Now, more than forty years after the United States Supreme Court's decision in *Brown v. Board of Education* heralded the end of legally sanctioned racial segregation in education, a majority of African Americans continues to attend public school systems that are predominantly non-white, while the overall educational attainment of African Americans continues to lag behind that of their white counterparts. This is the primary conclusion of Volume 15 of Readings on Equal Education, a valuable and insightful collection of fourteen essays, edited by Richard Fossey, from a number of law and policy scholars that examines the limitations posed by the law in the continuing struggle over racial segregation in the nation's schools and colleges. Given the broad dichotomy between desegregation efforts undertaken by the schools, as mandated by the courts on the one hand, and the affirmative action efforts voluntarily undertaken by universities, but increasingly repudiated by the courts on the other, the intended coverage of the book is somewhat ambitious, and the relevance of the contributions consequently uneven. Nevertheless, the overall quality and complexity of the analyses presented make the volume a valuable addition to the series and will be of interest to anyone who seriously pursues the study of the inequality of educational opportunity in the United States.

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The first half of the book examines the contentious efforts at desegregating the nation's public schools and scrutinizes the underlying problems facing inner-city schools that have seemingly mooted Brown's promise of an equal educational opportunity for all. The second part of the book focuses on the issue of race in institutions of higher education and the tensions created by the adoption of affirmative action practices benefiting members of so-called "under-represented" ethnic groups, analyzing key decisions affecting admissions and the awarding of scholarships and financial aid.

In the book's opening chapter, volume editor Richard Fossey provides a thoughtful analysis of the problems confronting the inner-city school which he believes contribute to the disadvantages facing African American students brought on by desegregation. Fossey also notes the significant absence in the literature of any effective strategies for ensuring that such students will ever realize the promise of racial integration first posed by Brown. Unfortunately, the quality of his analysis suffers as a result of the large number of typographical errors found throughout the chapter.

Analyses of two court cases follow in the succeeding chapters, both of which illustrate the inherent limitations of the law as a vehicle for providing effective solutions to the problem of school desegregation. Fossey and Elizabeth A. Kemper provide a useful analysis of the history of the Connecticut Supreme Court's 1996 decision in *Sheff v. O'Neill*, which relied upon the state constitution rather than a determination of de jure segregation to invalidate racial isolation in the schools, but which failed to specify what the appropriate remedy should be. However, the significance of the case is somewhat diminished by the authors' conclusions regarding the possible limitations posed by the decision. Ralph Mawdsley provides an excellent analysis of the United States Supreme Court decision in *Missouri v. Jenkins*, which governed the desegregation of the Kansas City, Missouri School District, and whose judicial history spanned a period of eighteen years. Because of his concise writing style and keen facility with judicial pronouncements, Mawdsley manages to more succinctly convey a greater appreciation for the complexity facing the courts and the judicial system generally as they struggle to establish the parameters of acceptable judicial intervention under the circumstances.

Christine H. Rossell does an excellent job of identifying possibly successful desegregation strategies, illustrating the greater efficacy of voluntary desegregation efforts over mandatory race-based student assignment program, by using two disparate school systems in Savannah, Georgia and Stockton, California as examples. In her study, she deftly shows how mandatory reassignment plans invariably produce a greater incidence of white flight out of the school districts, while voluntary programs offering magnet incentives result in a higher degree of interracial exposure. The chapter also provides some valuable reflections on the prevailing sentiments among African Americans, ostensibly the intended beneficiaries of the *Brown* decision, against mandatory reassignment plans.

The first half of the book concludes with a highly informative and well-written case study by Gary S. Mathews and Robin Garrett Jarvis of the attempts to desegregate the East Baton Rouge Parish School District, beginning with the filing of a lawsuit in 1956 and concluding with the issuance of a consent decree some forty years later. Avoiding unnecessary detail, Mathews and Jarvis provide a balanced analysis of the competing forces at work before the final adoption of the carefully-drawn voluntary desegregation plan could become a reality. Unlike many of the earlier chapters, their study also posits a more sanguine outlook on the future of the desegregation efforts undertaken.

The book's shift to the higher education arena begins with Edward P. St. John offering an historical perspective on the development of historically Black colleges and universities (HBCUs) and the emerging legal doctrines that now affect them. St. John does an admirable job of wrestling with the growing paradox faced by HBCUs in the aftermath of the Supreme Court decision in *U.S. & Ayers v. Fordice*, namely, how to continue to survive as institutions that should be valued as providing a means of promoting system-wide desegregation on the one hand, while simultaneously resisting legislative and judicial pressure to desegregate them, on the other. In the succeeding chapter, St. John and Don Hossler carry this analysis a step further, criticizing the new judicial emphasis on the achievement of numeric integration in the schools as ideologically misplaced. While simultaneously calling for a broader definition of "student choice" and the factors that motivate students to enroll in a particular institution, St. John and Hossler believe that it would be useful for HBCUs to adopt strategies that will positively influence enrollment of "other-race" students without compromising their traditional responsibility towards the African American student.

Three of the last four chapters in this section deal primarily with the issues raised in the *Fordice* decisions and in *Podberesky v. Kirwan*, the Fourth Circuit decision which overturned a race-based scholarship administered by the University of Maryland. The first chapter involves a succinct narrative by Anne Wells and John L. Strobe, Jr. that accurately details the factual and policy background involving the creation of the scholarship program and the legal history and reasoning behind the many court decisions in the *Podberesky* case. The second chapter by Monique Weston Clague analyzes the impact of the multiple *Fordice* and *Podberesky* decisions on faculty hiring practices and the operation of facially neutral student scholarship programs, contrasting the different outcomes in the cases. She astutely identifies the doctrinal inconsistencies held, and the disparate outcomes reached, by the courts in the two cases, and argues convincingly that minority targeted scholarship programs pose solutions for, rather than constitute, the problems that have been identified by the courts in their search for racial equity.

The final chapter in this area by Virginia Davis Nordin explores some of the practical policy issues raised in the *Podberesky* and *Hopwood* cases, raising the

possibility that the courts in both cases simply failed to understand the dynamics of higher education, and suggesting an alternative affirmative action model that could arguably find greater acceptance in the courts. While the chapter is clearly well-written, the piece adds little to the previous two discussions of the issues: if anything, the chapter falls somewhat short in its failure to discuss the *Hopwood* case and the issues it raised in any detail, given the fact that the two previous chapters focused more on *Podberesky* and the issues raised by minority targeted scholarships.

Offering a contrarian view on the appropriateness of affirmative action in higher education, Lino Graglia argues that the original intent of *Brown* to provide equal opportunity in education has been perverted into a system of illegal racial preferences whose days are numbered. He painstakingly identifies and dismisses the various policy arguments in favor of affirmative action, and while he offers nothing new in this regard, Graglia makes his points passionately and succinctly. Perhaps the overall breadth and quality of the volume's impact would have benefited from the inclusion of one or more essays mirroring Graglia's views that affirmative action in higher education should be ended.

The book concludes with a chapter by Charles Teddlie, Series Editor for the last three volumes of *Readings on Equal Education*, who provides a powerful reflection on the current literature on equal education and desegregation that helps to integrate this particular volume's many offerings into a broader conceptual framework and reaffirms its place as a vital part of this valuable series. His overall conclusion, that the success of future desegregation efforts will depend less on the federal judiciary and more upon an individualized consideration of the situational factors contributing to de facto desegregation for the specific institutions under attack, suggests a major shift in direction for the ongoing debate regarding affirmative action, and possibly additional material for another volume in this provocative series, a prospect that should be relished by all.

THE FIRST AMENDMENT

by Daniel A. Farber, The Foundation Press, Inc., 1998, 298 pages

*Reviewed by Marjorie Hodges Shaw **

I recommend *The First Amendment* by Daniel A. Farber to anyone who has an interest in understanding or teaching First Amendment legal doctrine. Farber does a good job of highlighting the cases that have shaped First Amendment law as well as identifying the strengths and weaknesses of current theories. While Farber does not set out to explore the fundamental philosophical principles, he does provide a broad philosophical overview as well as link his discussion of case law to an historical perspective to help the reader take away a sense of how First Amendment decisions do or do not relate to one another. In addition, the philosophical overview helps the reader understand the fundamentals of free expression and the Constitution. This background sets the reader up to fully comprehend the complicated developmental path of much of the current doctrine. As a result of linking the past with the present, Farber succeeds in making the basics of First Amendment legal doctrine interesting. Relying on the philosophical overview, he explains the variety of approaches that the different justices take in particular decisions. Providing this balanced detail gives the reader the understanding necessary to make informed judgments about current First Amendment debates. Students can use this understanding to analyze the current topics and predict outcomes of First Amendment cases while administrators can use this understanding to respond to issues on college and university campuses.

The book is divided into four parts. Part I addresses the foundation issues, including the origin of the First Amendment, First Amendment theories, overview of current doctrine, the rule against content discrimination, as well as providing a toolkit for analyzing potential First Amendment cases. Part II describes the different categories of "disfavored speech" (advocacy of illegal action, defamation, offensive communication and hate speech, obscenity and pornography, and commercial speech) and outlines governmental regulation of such speech. Part III covers the permissible regulation of "protected speech," including the public forum doctrine and speech in the public sector. Part III also addresses First Amendment requirements and obligations on the media, protections for group activities and protections for the electoral process. Part IV outlines the topic of religion, the Free Exercise Clause and the Establishment Clause.

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Though Part I is relatively short considering the weight of the material covered, it is a nice balance of history, theory, doctrine and practical tools. It provides sufficient coverage to give the reader an understanding of the different reasons why we protect speech that society considers unpleasant. Understanding the why helps set the framework for understanding the when and how discussed in Parts II and III. Students will benefit from learning the origin and history of First Amendment legal doctrine especially since Farber links later discussions to this past. In addition, the last chapter in this section provides the student the tools, the questions and answers, needed to determine whether a particular regulation or decision poses a First Amendment problem.

Farber spends most of the book on Parts II and III, providing the reader substantial detail about how the courts approach speech cases. The chapters in Part II are divided into the categories of speech including: advocacy of illegal action, defamation, offensive communication and hate speech, obscenity and pornography, and commercial speech. These chapters provide the background necessary to confront speech related decisions in higher education in the coming years. These are still the hot topics on campuses and in society generally. Each section includes the origin and history of the law surrounding the particular speech, any significant arguments raised by the dissenters, the pivotal cases (including any tests the Court sets forth), and special topics related to the defined speech. Farber does an especially nice job of linking the arguments by the dissenters to the development of the current doctrine. Occasionally I wished for more detail about a particular case, but in most instances Farber provides the reader with enough information to appreciate the analysis. Part III explains how the Court approaches speech issues in special settings, such as in commercial speech; on public property; in schools, prisons, and military settings; in the media; and in associations, groups and political campaigns. Farber does a nice job explaining why the Courts made exceptions in these special settings and detailing what those exceptions are. He does this in a way that is clear and understandable for all readers.

Despite the fact that Farber warns the reader that he will barely scratch the surface in his discussion of the role of religion in American public life and the interplay of this role with the First Amendment, Part IV left me wanting more. Still, given the complexity of this topic, Farber does a nice job of outlining the issues in a complicated area in a clear and concise way. He does provide the reader with information about the major issues and debates in religious freedom, the Free Exercise Clause and the Establishment Clause. Without writing a complete text on these topics, Farber nicely balanced the history, the fundamentals, judicial approaches and the chaotic doctrine. Even with the limited space devoted to the religion issues, readers do gain sufficient understanding to discuss and analyze religion cases.

This book does have the same drawback of any book written on paper and published through traditional means: it leaves unaddressed the most current

issues concerning the First Amendment and electronic communications. While Part III includes a section on the future of media law that discusses one internet related case, I would have enjoyed reading Farber's opinions about how current and emerging technologies are likely to impact the law throughout each section. In particular, I would like to know Farber's assessment of the new language in the federal Child Pornography Statute, language extending the First Amendment to a broad range of previously protected materials. This legislation is getting mixed results in the courts. It is a strong statement of appreciation when the only real criticism is that more would be better.

In sum, *The First Amendment* is a valuable resource for anyone who has an interest in understanding or teaching First Amendment legal doctrine. The core cases are thoroughly explained and the commentary describing the struggle between competing approaches taken by different Justices, and the resulting decisions, provides the reader with an understanding of and an appreciation for the complexity of First Amendment legal doctrine.

TEACHERS AND THE LAW (5th ed.)

by Louis Fischer, David Schimmel, and Cynthia Kelly, Addison Wesley Longman, Inc., 1999, 518 pp.

*Reviewed by John L. Strobe, Jr. **

The authors identify two purposes for their book: 1) “[T]o empower teachers to take the law constructively into their own hands”; and 2) “[T]o provide them with the knowledge necessary to improve school and classroom rules, to assert their rights, and to bring violations of the law to the attention of administrators and colleagues.” A thorough review of the contents, combined with over a decade of use of the book as a text for a graduate course in K-12 school law, assures this reviewer that *Teachers and the Law* can accomplish these purposes. “Can accomplish” is used to emphasize the point that no law text, without the user having a deeper understanding of law through case analysis, can accomplish such lofty purposes.

The authors see the book as having two parts: “The Legal Aspects of Teaching” and “Teachers’ and Students’ Rights.” The Table of Contents identifies chapters which focus on the topics which would be normally covered in any comprehensive treatment of school law: contracts, tenure, collective bargaining, liability, child abuse, defamation, copyright, speech, religion, association, due process, privacy, race, gender, disability, student records, compulsory attendance, due process, privacy, race, gender, disability, student records, compulsory attendance, and personal appearance.

The book’s initial chapter (“Teachers and the Legal System”), while describing the American legal system in typical terms, presents that description through the vehicle of a real case involving the nonrenewal of an untenured teacher. The various elements of the legal system are explained as the case develops. Such an approach tends to remove the “abstractness” so often accompanying an explanation of the legal system.

The final chapter (“What Issues Will Face the Courts in the Next Decade?”) identifies some emerging legal questions the authors expect will face educators. Among others, they name condom distribution, use of the Internet, school choice, affirmative action, and frivolous law suits. The reviewer’s experience with this chapter in previous editions attests to the sound foresight of the authors.

Perhaps the most unique, and potentially damning, aspect of *Teachers and the Law* is the question and answer format the authors use to explain the law. There is always the frightening prospect that educators just want “the answer”

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to their most pressing legal question. A book with a question and answer format could very wrongly lead people to see simple “yes and no” answers to decidedly complex legal matters. When used only as source for the “correct answer,” without being a part of a broader review of law using court opinions, the danger of just finding a simple answer is surely here.

However, when large segments of text are read, it becomes readily apparent the authors have done an excellent job of explaining the legal reasoning, and the relevant greatest “safety net” they have built into this book is their use of over 1,000 cases. For many of the questions they pose, there are multiple, and often contradictory, cases detailed. An attentive reader is highly unlikely to come away with a simple “yes” or “no” answer to any question.

Overall, *Teachers and the Law* has numerous strengths. Among those already identified are: comprehensive coverage, use of over 1,000 cases, application approach in Chapter 1, predictions in Chapter 2, and currency (fifth edition). The detailed subject index and glossary are very user-friendly. For those seeking to find citation errors or to disagree with the authors’ interpretations of cases there will be disappointment—they are few and far between! For those considering the use of *Teachers and the Law* as a text, it is readily compatible with use of full court opinions as the text explanations never “tell the whole story.” Finally, *Teachers and the Law* is always very readable, both in terms of making understandable a complex topic, and in terms of not being boring. Students always comment positively on their experiences with using the book, and often say they will keep it as a professional reference.

With all the strengths this book possesses, does it have any weaknesses? What should readers be concerned about as they read the book? What could be done to improve the sixth edition? As a general matter, there is always the nagging danger in the question and answer approach. But, since misuse of the approach rightly falls on the user, the authors just need to continue to be vigilant and to avoid falling into simplistic treatment in the face of more pages, higher costs, and the publisher’s worries! As to specific weaknesses, here are six matters for readers to note and for the authors to consider.

1. *Add a full court opinion.* There is not one full opinion in the book. Perhaps the opinion that resulted from the case used in Chapter 1 (to explain the legal system) would be appropriate. This could reduce the possibility a user would not have the opportunity to see the complexity of the law. An annotated explanation of the opinion would be a welcome conclusion to the opinion.

2. *Diminish the focus on constitutional rights and enlarge the chapters devoted to discrimination statutes and cases.* A bi-weekly reading of West’s *Education Law Reporter* shows the changing nature of the K-12 litigation landscape. This is especially relevant for disability law—perhaps the most pressing day-to-day legal problem facing educators. Changing the emphasis from constitutional rights would be a justifiable and useful improvement.

3. *Restructure the speech and religion chapters.* The Supreme Court has pushed far more of religion jurisprudence into speech and these chapters need to reflect that reality. Related to this problem is use of the term “freedom of conscience,” a term without constitutional significance. The authors should label the legal right what it is—religion or speech. Finally, the flag salute analysis should be correctly placed with the right relied on by the Supreme Court—speech (not religion).

4. *Follow the dictate of the due process clauses.* The chapter on due process comes *before* the discussions of privacy, compulsory attendance, and personal appearance. As these subjects implicate liberty rights, their treatment *after* discussing due process fails to follow the legally-sound model of the due process clauses. These chapters should be moved to come before due process.

5. *Restructure the chapter on liability.* The chapter mixes common law torts (mostly negligence) and constitutional torts. While the issues are both relevant to the chapter’s title (“When Am I Liable?”), inter-weaving the legal analyses presents an erroneous impression that the matters are treated similarly by the courts. There is a fairly simple solution—separate the legal analyses.

6. *Update the chapter on copyright.* In 1998, there was a revision of copyright law. Commendably, the authors already had increased their focus on copyright and related issues, especially with reference to technology. With the next edition, some revision in this chapter will be appropriate.

Teachers and the Law is a valuable contribution to the literature of K-12 school law. Other books are standard casebooks while others are “Bible-like” with “chapter and verse” answers. *Teachers and the Law* is unique in providing comprehensive coverage of broad subjects and in providing comprehensive answers to specific legal questions. Any teacher who wants to be empowered with a knowledge of the law will benefit from use of this book.