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978-0-521-88618-5 - When is Separate Unequal?: A Disability Perspective

Ruth Colker

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WHEN IS SEPARATE UNEQUAL?

This book does not start from the premise that separate is inherently unequal. Writing from an “anti-subordination perspective,” Ruth Colker provides a framework for the courts and society to consider what programs or policies are most likely to lead to substantive equality for individuals with disabilities. In some contexts, she argues for more tolerance of disability-specific programs, and, in other contexts, she argues for more disability-integrated programs. Her highly practical investigation includes the topics of K–12 education, higher education, employment, voting, and provision of health care. At the end of the book, she applies this perspective to the racial arena, arguing that school districts should be given latitude to implement *more* use of racial criteria to attain integrated schools because such environments are most likely to help attain substantive equality from an anti-subordination perspective. The book measures the attainment of equality not on the basis of worn-out mantras but instead on the basis of substantive gains.

Ruth Colker is one of the leading scholars in the United States in the areas of constitutional law and disability discrimination. She is the author of eight books, two of which have won prizes. She has also published more than 50 articles in law journals such as the *Harvard Law Review*, *Yale Law Journal*, *Columbia Law Journal*, *Pennsylvania Law Review*, *University of Virginia Law Review*, and *University of Michigan Law Review*. She has been a frequent guest on National Public Radio to comment on disability and constitutional law topics.

Colker is the Heck Faust Memorial Chair in Constitutional Law in the Michael E. Moritz School of Law at The Ohio State University. Before joining the faculty at Ohio State, she taught at Tulane University, the University of Toronto, the University of Pittsburgh, and in the women’s studies graduate program at George Washington University. She also spent four years working as a trial attorney in the Civil Rights Division of the United States Department of Justice, where she received two awards for outstanding performance.

Professor Colker was a recipient of Ohio State University’s Distinguished Lecturer Award in 2001, the University’s Distinguished Diversity Enhancement Award in 2002, and the University Distinguished Scholar Award in 2003. She is a 1978 graduate of Harvard University and a 1981 graduate of Harvard Law School.

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Disability, Law and Policy

The ***Disability, Law and Policy*** series examines these topics in interdisciplinary and comparative terms. The books in the series reflect the diversity of definitions, causes, and consequences of discrimination against persons with disabilities, while illuminating fundamental themes that unite countries in their pursuit of human rights laws and policies to improve the social and economic status of persons with disabilities. The series contains historical, contemporary, and comparative scholarship crucial to identifying individual, organizational, cultural, attitudinal, and legal themes necessary for the advancement of disability law and policy.

The book topics covered in the series also are reflective of the new moral and political commitment by countries throughout the world toward equal opportunity for persons with disabilities in such areas as employment, housing, transportation, rehabilitation, and individual human rights. The series will thus play a significant role in informing policy makers, researchers, and citizens of issues central to disability rights and disability antidiscrimination policies. The series grounds the future of disability law and policy as a vehicle for ensuring that those living with disabilities participate as equal citizens of the world.

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*To my mother, Janice Seiner Colker, for her love, compassion,
and wisdom*

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Preface

It's hard to pinpoint when I began writing this book. When I authored the article entitled "Anti-Subordination Above All: Sex, Race, and Equal Protection" in the *New York University Law Review* in 1986, I was not yet thinking seriously about disability issues on a theoretical level. As I began to do volunteer legal work for individuals with HIV in New Orleans, Louisiana, in 1986, I began to learn a great deal about how society mistreats many individuals with disabilities. And I began to see the challenges faced by the political and judicial systems in fashioning effective remedies when such discrimination has taken place.

I joined the faculty at the University of Pittsburgh School of Law in 1993, and I began to think more systematically about disability issues as I began teaching in this area of the law and writing one of the first casebooks for students to use to study the Americans with Disabilities Act (ADA). For the next decade, my work on disability was mostly of a practical nature. I conducted empirical research on the effectiveness of the ADA, wrote extensively about its legislative history, and analyzed whether the decisions under this statute were consistent with Congress's intent. During those many years of devoting myself to legal issues involving disability, I did not seek to develop a theory to explain my various views on this topic.

When Martha Nussbaum invited me to participate in a legal theory workshop at the University of Chicago in the fall of 2006, I decided

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that it was time to apply my anti-subordination perspective to disability. I sought to find coherence to my disability work in the areas of employment, education, and voting. This book is an outgrowth of those reflections.

Acknowledgments

This book has been made possible by generous assistance from the Michael E. Moritz College of Law at The Ohio State University, and feedback from many individuals over the years. I received excellent bibliographical and research assistance from former Moritz librarian Sara Sampson, as well as current Moritz librarian Katherine Hall. Many Moritz students have provided research assistance that is reflected in this book, including Pamela Bridgeport, John Billington, Christopher Geidner, Lana Knox, Megan Ledger, Liza Luebke, Chad Eggspuehler, and Catherine Woltering. I was able to hire these students due to a Distinguished Scholar research grant from The Ohio State University.

I would also like to thank Martha Nussbaum for her invitation to speak about disability theory at the University of Chicago Law & Philosophy Workshop in fall 2006; that invitation sparked the development of many ideas underlying this book. Faculty at the Moritz College of Law provided useful and constructive feedback at a summer workshop in July 2006. Faculty at the University of Cincinnati Law School also provided useful feedback at the workshop held in November 2006; I particularly thank Suja Thomas for making that invitation possible. This book has also benefited from a symposium held at Emory Law School and the Thornburgh Family Lecture at the University of Pittsburgh School of Law in fall 2007. Finally, this book has benefited from discussions with James Brudney, Martha Chamallas, Sarah Cole,

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Daniel Tokaji, Elizabeth Emens, Roanne Flom, Scott Lissner, Amanda Lueck, Deborah Merritt, Heather Sawyer, and Marc Spindelman. Of course, the views expressed are my own.

A special word of thanks is necessary for Chapter 6. That chapter is excerpted from an article that I jointly authored with my colleague Daniel P. Tokaji, which was published in the *McGeorge Law Review* as part of an ABA-sponsored voting rights symposium. I have included this chapter with permission from Professor Dan Tokaji but note that much of this chapter reflects his important work on this topic.

And, of course, this book would not be possible without the support of my family. My children generously shared the household computer so that I could refine many of these arguments. And my son teaches me on a daily basis how individuals with disabilities make choices to enhance their lives. I hope this book can help expand those choices.