

EPC PREWRITE

To: Congresswoman

From: Associate

Re: 14th Amend EPC Claims against Law

It is my conclusion that the Supreme Court WOULD/would NOT rule in favor of Plaintiff in an equal protection clause (EPC) challenge of the gov. action/law...

A. Does the law classify on the basis of a suspect classification?

The issue is whether Plaintiff could be successfully challenge the law [state/fed. gov. or law/statute] as violating of the 14th Amendment EPC. The first inquiry is whether the law uses a suspect classification.

B. Facial Classification?

The doctrinal rule is that if a law uses a suspect classification on its face, it invokes heightened scrutiny as the standard of review.

1. Facial Race Classification Level of Scrutiny

As a rule, a law that facially classifies based on race is subject to strict scrutiny presumed unconstitutional.

a. Government BoP under Strict Scrutiny

Under strict scrutiny, the government must show a compelling purpose for enacting or upholding the law, and that the law is necessary, meaning that the compelling purpose could not be accomplished through a race-neutral law.

- Compelling gov purpose (ie: national security, see *Korematsu*)
- Purpose can only be accomplished through the discriminatory law (means tightly fits ends)
- See *Plessy v. Ferguson*
- Brown v. Board*
- Loving v. Virginia*
- Korematsu*

b. BoP to Defend Affirmative Action under Strict Scrutiny

-See **Crosby**: must show a (1) NEED for remedying past and (2) current discrim with STRONG basis in evidence

i.e. the party enforcing the AA law must be the PROVEN violator of, or was a passive participant in, race discrim
> **then** the AA law is justified for the purpose of assuring public funds don not finance private prejudice.

****Note: Most affirmative action laws are racial on their face** - so strict scrutiny applies and plaintiff doesn't need to prove purpose

- SS makes it hard to uphold a law - this standard makes sense for laws that harm people/minorities (like *Korematsu...*);
- SS doesn't make sense for laws that benefits people/minorities, unless it adversely affects other groups (with the purpose standard as proof)
- Suggestion: WHAT IF to strike down an affirmative action law, plaintiff must prove that the law was enacted for the purpose of disadvantaging the racial majority, and that it actually would?
- CURRENTLY the only way the purpose requirement would apply to the racial majority is if if an affirmative action law was facially neutral, but its

impact created an advantage for racial minorities, the challenger (white/majority) would have to prove discriminatory PURPOSE

***Higher edu AA exception** (universities have a special 1st Amen rights to decide who they want to admit) = (1) remedy discrimination or (2) diversity

2. Facial Gender Classification Level of Scrutiny

As a rule, a law that facially classifies based on gender is subject to intermediate scrutiny and has no constitutional presumption.

a. Government BoP under Intermediate Scrutiny

Under intermediate scrutiny, the government must show an important purpose for enacting or upholding the law, and that this important purpose is substantially related to the facially gendered law.

(1) **Important gov purpose** (ie: offering financial assistance to spouses (yes); importance of single-sex education (no))

(2) **Purpose is substantially related** to the discriminatory law (means substantially fits ends)

-Reed v. Reed - Court struck down state law that specified hierarchy of person to be appointed as administrators of estate when a person died intestate; male was preferred over female (for administrative convenience).

- First time SC struck down a gender classification law, but used **rational basis review, not HEIGHTENED scrutiny.**
- This was a legitimate government interest, so under rational basis, the government was probably okay to pass that law.
- However, even though the court said it was using RB, it may have used a heightened scrutiny (which eventually became intermediate scrutiny).

-Craig v. Boren

-VMI case

-Orr v. Orr

-MUW v. Hogan

b. BoP to Defend Affirmative Action under Intermed. Scrutiny

-See Califano: reduction of the economic disparity between men and women caused by a long history of discrimination against women, where that discrim has been overt or due to socialization of a male-dominated society = IMPORTANT gov. objective

> **So...** AA policy allowing women to adjust their Social Security monthly wage computation was upheld.

3. Non-Suspect Classification Level of Scrutiny

As a rule, a law that does not discriminate based on a suspect class is presumed to be constitutional, and is subject to rational basis review. However, if a law was shaped out of animosity toward a non-suspect class, it is subject to animus review, or rational basis "with bite." Additionally, a non-suspect class may invoke a higher standard of review by articulating that the class qualifies as a suspect class.

a. Government BoP under Rational Basis

Under rational basis the government must show a legitimate purpose for the law, and that the law is rationally related to accomplishing that purpose.

-Railway Express - NY law distinguishes between people that own a truck and that don't; people can only advertise on their own trucks

(1) Legit purpose = public safety/avoid driving distractions

(2) Rationally related = Court held YES (but not really rational bc what makes a sign more distracting based on who owns the advertisement or the truck?)

Note - very low standard to qualify for rational basis review; and a very loose fit between gov purpose and means to achieve purpose

-Massachusetts Retirement - law requiring police officers to retire at age 50 did not meet rational basis review; the court declared the law "irrational" bc the officers still had to pass the physical fitness test, so requiring them to retire at 50 is irrelevant to accomplishing the gov purpose of maintaining fit police officers

-San Antonio v. Rodriguez - does the state funding of public schools impinge on a fundamental right or disadvantage a suspect class? Finding there is no fundamental right to education, and that persons living in poor communities are not a suspect class, the court applied rational basis for both SDP and EP claims. It found that the tax/fiscal scheme was rationally related to school funding, and that no tax/fiscal scheme is free from discriminatory impact.

b. BoP under Rational Basis "with a bite"

The court will not uphold a classification that bears no rational relationship to a purpose, and is only explicable by animus. If a law has the "peculiar property of imposing a broad and undifferentiated disability on a single named group," the law is invalid. **See Romer v. Evans.**

It is not within constitutional tradition to enact or uphold a law that "identifies persons by a single trait and then denies them protection across the board. Id. Further, making it more difficult for one group to seek government aid than another group is "denial of equal protection of the laws in the most literal sense." Id.

c. Arguing for Suspect Class Status w/ the Frontiero Factors

Here, ____ is a non-suspect class, and will receive rational basis review, unless successfully argued that ____ should be recognized as a suspect class. While the Court has been hesitant to add suspect classifications to invoke heightened scrutiny, in order to vigorously represent our client we must argue the *Frontiero* factors to convince the Court that it should not be deferential in this case. Finally, in arguing these factors, it is important to note that the government does not automatically lose when heightened scrutiny applies, but is merely required to provide a justification for the law. (*Be careful not to turn the factors into a policy argument - stay within the law and doctrinal argument.*)

(1) Does the class have an immutable characteristic? (ie race; something a person cannot change or "opt out of"; people are born into a class and will face barriers that people born into another class will never face... keep in mind this is just a factor)

NOTE - Use language from *Obergefell*: “Immutable nature” as homosexual dictates that same-sex marriage is their only path to marriage’s commitment. (Assertion of a *Frontiero* factor to create suspect class...)

(2) Is there a history of discrimination against the class?

(3) Is the class politically excluded/underrepresented?

****Practicing arguing these factors for *San Antonio v. Rodriguez***

-Is poverty an immutable characteristic? (**gov will argue** that living in poverty is mutable/a choice; but then argue that people are born into socioeconomic classes that make access to jobs and wealth much more difficult, and like race/gender, people born into a low socioeconomic class will face barriers that people born into wealth will never face)

-Is there a history of discrim against the poor? (yes, looked at as lesser; excluded from political process)

-Are the poor politically underrepresented in the political process? (yes, our political system is driven by money and power)

****Practicing arguing these factors for *Obergefell v. Hodges***

Note - the government will argue that sexual orientation is mutable/a choice; but then argue that religion is a suspect class and religion is arguably a choice (asking someone to change religion like asking someone to change sexual orientation?)

C. Facially Neutral Classification

If a law is facially neutral, thus failing to invoke heightened scrutiny, the burden is on the plaintiff to prove that law distinguishes on the basis of a suspect classification by showing a discriminatory purpose.

1. Discriminatory Purpose

As a rule, proof of a discriminatory purpose, not merely discriminatory impact, is required to show that a facially neutral law constitutes a suspect classification. See *Washington v. Davis*. The doctrinal rule for proving discriminatory purpose is showing that a law was enacted or upheld “because of” its adverse effects on an identifiable group, not merely in “spite of” its adverse effects. See *Personnel Admin. v. Feeney*. In order to prove purpose, apply the *Arlington Heights* factors.

- Statistical proof of disp. impact (but alone, not enough. See *McClesky*) (See also Steven’s dissent in *Feeney*, proposing factors as to when a showing of disp. impact is enough to prove purpose)
- Deviation from procedure (suspicious events leading up to decision)
- Decision inconsistent with typical priorities/substantive considerations
- Legislative or administrative history (statements of decision makers)
- **If satisfied**, strict or intermediate scrutiny applies; **if not satisfied**, rational basis applies

2. Critique/Alternative to the Purpose Requirement

Justice Steven’s dissent in *Feeney* noted that the fact that a law was made to advantage one group does not automatically rule out that the law could simultaneously have been intended to disadvantage another group.

- a. Discriminatory intent/purpose may be inferred from inevitable/ foreseeable consequences
- b. Proposed factors as to when a showing of disparate impact is enough to prove purpose
 - (1) degree of disparate impact
 - (2) inevitability of impact
 - (3) foreseeability of impact
 - (4) reasonable alternatives to the law creating the impact

RACE-BASED AFFIRMATIVE ACTION

1. What level of scrutiny is applied to racial classifications benefitting minorities?

- **MAJORITY/CURRENT view**: race-consciousness of any kind should be subject to **Strict Scrutiny- *Richmond v. Croson***
 - Post-civil war amendments purpose= **Color-blindness**
 - Importance of colorblindness
 - **Stigma against beneficiaries**- makes society more racist because people will have more animosity against beneficiaries of affirmative action.
 - Some minorities/African Americans also hold this view, arguing they don't get credit for their work or intelligence.
 - **Importance of individual decisions**- everyone should be judged based on their own actions and own character.
 - **Gov't can demonstrate COMPELLING interest in VERY limited circumstances.**
 - ***Bakke* [POWELL], *Grutter*, *Gratz*, *Fisher*, *Richmond v. Croson*, *Adarand***
- **MINORITY VIEW**- Race consciousness should be subject to **SS if purpose is to subordinate; and IS if purpose is to redress discrimination or to diversity.**
 - Purpose of post-civil war amendments= Combat subordination on basis of protected traits; **Anti-Subordination Principle.**
 - Different if **majority deprives itself** – distinguish from majority depriving minority
 - Footnote 4 was not meant to apply when majority is making a law that is designed to protect and make for discrimination against insular minorities.
 - **Necessary to use race remedy to make up for long history of discrimination** and put minorities in the position had there not been discrimination
 - **Necessary to achieve other goals**, such as diversity in gov't jobs, schools, etc.
 - Applying SS would **discourage states from attempting to remedy past discrimination**

- *Metro broadcasting, Bakke* [BRENNAN, WHITE, MARSHALL, BLACKMUN]

2. What purposes for affirmative action programs are sufficient to meet the level of scrutiny? COMPELLING gov't interest?

- Need a **strong basis in evidence of need to remedy** discrimination
- **Court has ACCEPTED:**
 - **Remedying IDENTIFIED past and current race discrimination** by the **PROVEN violator**, and in which **the gov't is the passive participant or violator**.
 - You, yourself have to be the one that committed the discrimination (proven violator)
 - This is unlikely, because most violators will not produce evidence of their own past discrimination because they will get sued. Ex. *Richmond*
 - **Special rule in educational context**- “strong basis in evidence of need to remedy discrimination” or for “diversity” are accepted Compelling gov't interest
- **Court has REJECTED:**
 - **Remedying de facto, industry wide or societal race discrimination**
 - De facto= no evidence of exclusive race discrimination by violator
 - **Increasing services in minority community**
 - **Need for minority role models**
 - **Reducing historical deficits of minorities**

3. What techniques of affirmative action are sufficient to meet the level of scrutiny? NARROWLY TAILORED?

- **Considerations:**
 - 1. **Individualized consideration**
 - 2. **Availability of race-neutral alternative**- if same goal can be achieved through race-neutral means
 - 3. **Minimizing undue harm to other race**
 - 4. **Limited in duration**
- **Court has ACCEPTED:**
 - **Goals and timetables with disparity studies**
 - **Using race as one factor in decision-making- *Bakke***
- **Court has REJECTED:**
 - **Quotas and numerical racial balance requirements – *Bakke, Richmond***
 - **Adding points to applicants test/admission scores based on race**
 - **Disrupting employment seniority systems – *Wygant v. Jackson***