Lecture Notes

# Chapter 14: Contemporary Approaches to Equal Protection

## Annotated Chapter Outline

1. Introduction
   1. ***United States v. Carolene Products Co.* (1938)**
      1. The contemporary Court has developed three different tests to evaluate claims of discrimination.
      2. The genesis seems to lie in Footnote Four, which contains some important ideas.
         1. First, certain groups are more likely than others to be the target of different kinds of discrimination.
         2. Because of these difficulties and obstacles, courts may not be able to trust legislatures to draw classifications that reflect legitimate interests rather than a bad motive in the form of prejudice.
      3. Over time, the Court transformed these ideas into the strict scrutiny test.
2. Rational Basis Scrutiny
   1. ***New York Transit Authority v. Beazer* (1979)**
      1. The New York City Transit Authority refused to hire people who use narcotic drugs.
      2. Included in the category of narcotics was methadone, a drug used to help treat addiction to heroin.
      3. Beazer and several others who were receiving methadone therapy brought suit, claiming that the TA had violated the equal protection clause.
      4. The TA claimed that it needed to discriminate against methadone users to ensure a “capable and reliable work force.”
      5. The methadone users claimed that the policy is underinclusive because some non–methadone users are unsafe and unreliable workers.
      6. The workers also argued that the policy is overinclusive because it covers too many people.
      7. While acknowledging that the fit between the TA’s classification and its justification was not the tightest, the majority did not see anything invidious in the classification.
   2. ***Cleburne v. Cleburne Living Center* (1985)**
      1. The Court applied rational basis scrutiny and found a violation of the equal protection clause.
      2. Only if the real motivation was bias against a particular group did the ordinance make sense.
3. Strict Scrutiny and Claims of Race Discrimination
   1. Racial Classifications That Disadvantage People of Color
      1. ***Korematsu v. United States* (1944)**
         1. The Court noted that, as members of a suspect class, Black litigants enjoyed the advantages of a rigid scrutiny test.
      2. *Loving v. Virginia* (1967)
         1. This case concerned the part of life that segregationist forces least wanted to see integrated: marriage.
         2. Sixteen states, all of them southern or border states, had miscegenation statutes that made interracial marriages unlawful.
         3. This case illustrates the Court’s rejection of government policies that place minorities at a disadvantage or are based on racial stereotypes.
      3. ***Washington v. Davis* (1976)**
         1. At issue was a standard verbal ability, reading, and vocabulary examination that all applicants to the police force in Washington, D.C., were required to take.
         2. Unsuccessful Black applicants challenged the exam, pointing out that the test had a disproportionately negative effect on Black candidates.
         3. A federal appeals court agreed, but, in a 7–2 decision, the Supreme Court reversed.
         4. Justice White emphasized that a successful constitutional challenge requires proof of discriminatory intent.
   2. Diversity (Affirmative Action) Programs
      1. Affirmative action programs have their roots in presidential orders, issued as early as the 1940s, that expanded government employment opportunities for Black Americans.
      2. Supporters of affirmative action tend to advocate against strict scrutiny.
         1. To them, strict scrutiny should be reserved for classifications that burden racial minorities because the entire point of strict scrutiny is to uncover racial animus.
      3. Opponents of affirmative action contend that the Court should apply strict scrutiny.
         1. To them it is irrelevant whether the program benefits racial minorities; the only question is whether the program draws a classification on the basis of race.
      4. The Court Enters the Fray
         1. *Regents of the University of California v. Bakke* (1978)
            1. This case was an equal protection clause challenge to a public university’s policy to admit a specific number of minority applicants.
            2. Justice Powell’s opinion was a victory for Allan Bakke, who won admission to the medical school at Davis after a long legal battle.
            3. The justices, however, were sharply divided not only in their views of affirmative action programs but also over the legal grounds on which to rest the Court’s ruling.
            4. Four justices concluded that the university had violated Bakke’s rights under Title VI of the Civil Rights Act of 1964, avoiding constitutional controversy.
            5. Four justices argued that intermediate scrutiny was the appropriate standard to use in “benign” discrimination cases and that the University of California’s program was constitutional under that analysis.
            6. Four other justices preferred to invalidate the university’s admissions policy on statutory grounds.
   3. The Demise of Affirmative Action Programs in University Admissions
      1. ***Grutter v. Bollinger* (2003)**
         1. The Court agreed that strict scrutiny was the appropriate test for deciding racial preference cases.
         2. The Court also agreed that a diverse student body is a sufficiently compelling state interest to justify taking race into account as one of several diversity factors considered.
         3. Because the admissions program at issue withstood the strict scrutiny analysis, the Court upheld it.
      2. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (2023)
         1. The Court held that race-based admissions programs do not withstand strict scrutiny violate and the equal protection clause, effectively overruling *Grutter*.
4. Heightened Scrutiny and Claims of Gender Discrimination
   1. ***Bradwell v. Illinois* (1873)**
      1. The Court heard a challenge to an action by the Illinois Supreme Court denying Myra Bradwell a license to practice law solely because of her sex.
      2. The Court, with only Chief Justice Salmon P. Chase dissenting, upheld the state action.
      3. Justice Bradley said that he gave his “heartiest concurrence” to contemporary society’s “multiplication of avenues for women’s advancement.”
      4. But, he added, “The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”
   2. *Minor v. Happersett* (1875)
      1. The Court upheld Missouri’s denial of voting rights to women, a precedent in effect until ratification of the Nineteenth Amendment in 1920.
   3. *Muller v. Oregon* (1908)
      1. The Court upheld a maximum-work-hours law that covered only women, echoed Justice Bradley’s view of women.
   4. *Goesaert v. Cleary* (1948)
      1. The justices declared valid a Michigan law that barred a woman from becoming a bartender unless she was a member of the bar owner’s immediate family.
   5. *Hoyt v. Florida* (1961)
      1. The justices upheld a Florida law that automatically exempted women from jury duty unless they asked to serve.
   6. Level of Scrutiny
      1. *Reed v. Reed* (1971)
         1. As issue was the validity of an Idaho inheritance statute that used sex classifications, which ACLU attorneys challenged as a violation of the equal protection clause of the Fourteenth Amendment.
         2. It was clear that the statute’s challenger would have to demonstrate both invidious discrimination and state action.
         3. What was not so clear was the standard of scrutiny the justices would use.
         4. The Court’s unanimous decision applied two important principles to gender-based discrimination.
            1. First, that administrative convenience is no justification for violating the Constitution.
            2. Second, that laws containing overbroad, gender-based assumptions violate the equal protection clause.
      2. ***Frontiero v. Richardson* (1973)**
         1. An Air Force lieutenant claimed that the military’s benefits policy discriminated on the basis of sex in violation of the Fifth Amendment’s due process clause.
         2. Her argument rested on the fact that husbands of female officers were not eligible for benefits without proof that the husband was financially dependent on his wife.
         3. However, male officers’ wives were presumed to be financially dependent and were automatically entitled to benefits.
         4. The Court struck down the benefits eligibility rules.
         5. The justices remained far apart on the question of the appropriate level of scrutiny to apply.
      3. *Craig v. Boren* (1976)
         1. The justices adopted an entirely new standard of scrutiny for gender discrimination cases.
         2. This test, known as intermediate or heightened scrutiny, requires that laws that classify on the basis of sex be substantially related to an important government objective.
         3. The intermediate scrutiny test was adopted by a narrow margin, but the decision fundamentally changed sex discrimination law.
   7. The Court’s Application of Intermediate Scrutiny
      1. Gender-Based Classifications the Court Has Voided
         1. ***Mississippi University for Women v. Hogan* (1982)**
            1. This suit, filed by a male who was denied admission to a nursing program, challenged state-operated single-sex schools.
            2. The admissions policies provided an opportunity for Justice O’Connor, the first woman appointed to the Supreme Court, to express her legal views on laws that classify according to sex.
            3. This decision seemed to settle the matter of government-operated single-sex schools—they violate the Constitution.
         2. *United States v. Virginia* (1996)
            1. A state school in Virginia resolutely resisted compliance with Mississippi University for Women.
            2. It asserted that its military nature distinguished them from other colleges and universities and that introducing coeducational instruction would require changes that would alter the nature of the school.
            3. When the case reached the Supreme Court, the Clinton Justice Department asked the Court adopt the suspect class test as the appropriate standard for use in sex discrimination cases.
            4. Although the Court struck down VMI’s single-sex admissions policy, the justices still did not adopt the strict scrutiny standard for sex discrimination cases.
         3. ***Sessions, Attorney General v. Morales-Santana* (2017)**
            1. This case involved a gender-based distinction in the Immigration and Nationality Act.
            2. Justice Ginsburg’s majority opinion reiterated the now-standard test that the challenged classification serves important governmental objectives and it is substantially related to the achievement of those objectives.
            3. Ginsburg also mentioned several times that the government must supply an “exceedingly persuasive justification” when laws differentiate on the basis of gender.
         4. Gender-Based Classifications the Court Has Upheld
         5. ***Michael M. v. Superior Court of Sonoma County* (1981)**
            1. Michael M. was charged with a violation of Section 261.5 of the California penal code, which prohibits “an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.”
            2. This statutory rape law makes males alone criminally liable for the act of sexual intercourse.
            3. Michael M. moved to have the criminal prosecution dropped on the grounds that Section 261.5 invidiously discriminates on the basis of sex and therefore violates the equal protection clause.
            4. The Supreme Court upheld the law.
         6. ***Rostker v. Goldberg* (1981)**
            1. The federal legislation challenged in this case continued the policy of distinguishing men and women with respect to military service.
            2. The case also involved Congress’s constitutional power to raise and regulate the armed forces.
            3. Three days before draft registration program was to begin, a federal district court declared the law unconstitutional because its single-sex provisions violated the due process clause of the Fifth Amendment.
            4. The justices upheld the registration law.
5. Discrimination Based on Sexual Orientation
   1. ***United States v. Windsor* (2013)**
      1. This case struck down a section of the 1996 Defense of Marriage Act denied federal recognition of same-sex marriages even for couples living in states that recognized such unions.
   2. *Bowers v. Hardwick* (1986)
      1. The Court upheld laws against sodomy.
      2. In the years since *Bowers*, though, the Court has grown increasingly hostile to laws that classify or otherwise burden on the basis of sexual orientation.
   3. *Romer v. Evans* (1996)
      1. This case is the most significant interpretation of the equal protection clause as it applies to classifications based on sexual orientation.
      2. The justices distanced themselves from the “strict scrutiny” approach.
      3. The Court concluded Amendment 2 offends the lowest level of scrutiny (rational basis).
      4. The state singled out sexual orientation for political disability, so it was driven by animus against gays and lesbians.
      5. The Court has not outlined the level of scrutiny classifications on sexual orientation should be subject to.
6. Discrimination Based on Economic Status
   1. *City of New York v. Miln (1837)*
      1. The Court supported the power of the state to take “precautionary measures against the moral pestilence of paupers.”
   2. ***Shapiro v. Thompson* (1969)**
      1. The Court decided that a rational basis standard normally would be appropriate in cases involving classifications based on wealth, but when a fundamental right also is involved—here, the right to interstate travel—the standard is elevated.
   3. ***Saenz v. Roe* (1999)**
      1. The Court reaffirmed *Shapiro v. Thompson* by striking down a California law that imposed similar economic disadvantages on new residents who moved into the state.
   4. ***Harper v. Virginia State Board of Elections* (1966)**
      1. The Court utilized the same logic to strike down poll taxes as infringing on the fundamental right to vote.
   5. *San Antonio Independent School District v. Rodriguez* (1973)
      1. This case outlines that when a fundamental right is not involved, the justices tend to stick with the rational basis standard.
         1. This case involved the right of children to receive a public education.
         2. The case questioned the constitutionality of the way Texas funded public schools.
         3. The challenged Texas system was similar to schemes used by most states.
      2. This decision was a blow to civil rights advocates, as validated systems that perpetuated inequity and introduced obstacles for future litigation.
      3. The Court also held that education was not a fundamental right under the Constitution.
7. Discrimination against Non-U.S. Citizens
   1. ***Yick Wo v. Hopkins* (1886)**
      1. In this case, the justices held that a noncitizen was entitled to equal guarantees under the Constitution.
      2. Since then, the Court has nullified laws that prohibit noncitizens from governmental services.
   2. ***Graham v. Richardson* (1971)**
      1. This case challenged the denial of public assistance to a noncitizen.
      2. The Court accorded suspect class to noncitizens that lawfully reside in the U.S., as they are politically powerless but still pay taxes, support the economy, serve in the military, and contribute to society.
      3. The Court has waffled on this ruling.
         1. The *Nyquist v. Mauclet* (1977) ruling reiterated *Graham,* holding state classifications based on alienage are subject to strict scrutiny.
         2. In ***Foley v. Connelie* (1978)**, a divided Court concluded a state’s denial of a noncitizen of a job in law enforcement did not violate the Constitution.
   3. *Plyler v. Doe* (1982)
      1. The Court ruled children who are noncitizens cannot be denied a free public education.
8. The Future of Discrimination Law
   1. Discrimination issues continue to evolve.
   2. Many discrimination disputes are variations on old themes (e.g., illegal immigration).
   3. Other issues are new; groups that have recently reached a critical stage begin to bring cases before the Court (e.g., disability).
   4. The evolution of discrimination law is affected by the ideology of those who occupy the federal judiciary; judicial retirements and appointments take on special significance.