

MODULE 10

Equal Protection: A Framework; Rational Basis; Race to Brown

Railway Express · Beazer · Moreno · Cleburne · Romer · Dred Scott · Plessy · Korematsu · Brown · Loving

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Equal protection: three questions

The framework for every classification case.

1

The classification

Facial, or neutral with intent and effect?

2

The level of scrutiny

Set by who is classified.

3

The fit

Does the law survive that scrutiny?

Choose the tier and you have very nearly decided the case.

Which classifications are suspect?

Three kinds — and the reasons a class earns closer scrutiny.

SUSPECT

- Race; national origin.
- Alienage — with exceptions.

QUASI-SUSPECT

- Sex.
- Nonmarital birth.

EVERYTHING ELSE

- Age, wealth, disability.
- Sexual orientation: unsettled.

Suspect: immutable, politically powerless, a history of prejudice.

The three tiers of scrutiny

The end, the means, and who carries the burden.

STRICT • SUSPECT

- A compelling purpose.
- Necessary, narrowly tailored means.

INTERMEDIATE • QUASI

- An important purpose.
- A substantial relationship.

RATIONAL BASIS • ALL ELSE

- A legitimate purpose.
- Rational means.

Heightened: the government bears the burden. Rational basis: the challenger does.

Over- and under-inclusiveness

My board's example: no one under 16 may drive.

UNDER-INCLUSIVE

- Bad drivers over 16 may drive.

OVER-INCLUSIVE

- Good drivers under 16 may not.

Rational basis tolerates misfit. Strict scrutiny demands the circles nearly coincide.

Madison and Stone

Two cures for majority faction. One structural, one judicial.

MADISON, 1787

- Extend the republic.
- No single faction can rule.

STONE, 1938

- “Discrete and insular minorities.”
- A “more searching judicial inquiry.”

Is Stone completing Madison's argument — or conceding that it failed?

Rational basis at work

Advertising on trucks; methadone and the subway.

RAILWAY EXPRESS, 1949

- Ads on trucks banned — except your own.
- Upheld: no need to cure every evil.

BEAZER, 1979

- No methadone users on the payroll.
- Over-inclusive. Upheld.

Jackson: the surest check on arbitrary law is to make it apply to everyone.

Rational basis “with a bite”?

Food stamps for “hippies”; a group home in Cleburne.

MORENO, 1973

- No food stamps for unrelated households.
- Aimed at “hippies”: not legitimate.

CLEBURNE, 1985

- A permit denied to a group home.
- Fear is not a legitimate interest.

A “bare . . . desire to harm a politically unpopular group” is not a legitimate interest.

Romer v. Evans, 1996

Colorado's Amendment 2, and animus.

THE AMENDMENT

- No protection for gay people, anywhere in Colorado law.
- The political process changed for one group.

THE COURT

- No tier decided.
- Fails even rational basis: animus.

“Inexplicable by anything but animus toward the class it affects.”

The rational-basis cases, sorted

Same test, different results. What made the difference?

Ads on delivery trucks	Railway Express	Upheld
No methadone users	Beazer	Upheld
No unrelated households	Moreno	Struck: “hippies”
A permit for a group home	Cleburne	Struck: fear
No protection for gay people	Romer	Struck: animus

Race before the Civil War Amendments

My timeline, Part I: 1776 to 1868.

1776

“All men are
created equal.”

1789

Slavery
protected, never
named.

1857

Dred Scott.

1865

The Thirteenth
Amendment.

1868

The Fourteenth:
all persons born
here are citizens.

My board says 1860 and 1867. The war began in 1861; the Amendment was ratified in 1868.

Dred Scott v. Sandford, 1857

Three questions, three answers — all against him.

A CITIZEN?

- No — because of his race.
- So no federal suit.

FREE IN THE TERRITORY?

- No — the Missouri Compromise is void.

FREE IN ILLINOIS?

- No — Missouri law governs on return.

The Fourteenth Amendment's first sentence overruled it.

Strauder and Plessy

The Amendment enforced, then emptied.

STRAUDER, 1880

- Juries limited to white men.
- Struck down.

PLESSY, 1896

- Separate railway cars.
- Upheld: “separate but equal.”

Harlan, dissenting: “Our Constitution is color-blind.”

Korematsu, 1944

Strict scrutiny announced — and failed on its first test.

THE STANDARD

- Racial restrictions are “immediately suspect.”
- “The most rigid scrutiny.”

THE RESULT

- Deference to the military.
- Upheld — “gravely wrong,” 2018.

“Pressing public necessity may sometimes justify . . . ; racial antagonism never can.”

The road to Brown

My timeline, Parts II and III: 1938 to 1954.

1938

Gaines: no paying Black students to leave.

1950

Sweatt: a separate law school is not equal.

1951

Briggs: Waring, “per se inequality.”

1953

Reargument.
Vinson dies;
Warren arrives.

1954

Brown I,
unanimous.

Waring wrote “per se inequality”; “all deliberate speed” is Brown II's.

Brown v. Board, 1954

Separate is inherently unequal. And Bolling, for the District.

BROWN I

- History “inconclusive”: no going back to 1868.
- Segregation “generates a feeling of inferiority.”

BOLLING

- The District is federal.
- The Fifth Amendment does the same work.

“Separate educational facilities are inherently unequal.”

Loving v. Virginia, 1967

The end of “equal application.”

VIRGINIA'S ARGUMENT

- It punishes both spouses equally.

THE COURT, 9-0

- “Equal application” is no defense.
- The purpose: White Supremacy.

A racial classification must “stand on [its] own justification.”

Current case: Talbott v. United States

D.C. Cir. 2026: transgender service members, and military deference.

SERVING MEMBERS

- Injunction affirmed.
- The policy may not be enforced against them.

APPLICANTS

- Injunction vacated.
- Deference to military judgment.

Deference to the military — but no abdication of “the constitutional question.”

For discussion: which tier?

Classify, choose the tier, test the fit.

THE LAWS

1. Road tests for drivers over 70.
2. No halfway house after neighbors object.
3. Public housing kept majority white.
4. No city may protect the homeless.

QUESTIONS FOR DISCUSSION

1. What is the classification?
2. Which tier applies?
3. Does the fit survive?
4. Is animus the real purpose?

Module 10 on one slide

One line per rule.

THE LINE, ONE RULE AT A TIME

- Classify, choose the tier, test the fit.
- Rational basis tolerates misfit, not animus (Moreno; Romer).
- Race is suspect: “the most rigid scrutiny” (Korematsu).
- Separate is inherently unequal (Brown).
- “Equal application” is no defense (Loving).

Next — Module 11: remedies, intent and affirmative action.

Next: Module 11 — Remedies for Segregation; Proving a Classification; Affirmative Action.