

MODULE 11A

Equal Protection: Gender; Alienage; Age; Disability; Wealth; Sexual Orientation

Craig · Virginia · Morales-Santana · Plyler · Murgia · Rodriguez · Skrmetti · B.P.J.

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Which classes get heightened review?

Four factors, from the 1970s cases.

1

Immutable

Fixed by the accident of birth.

2

History

Purposeful unequal treatment.

3

Stereotype

The trait says nothing about ability.

4

Powerless

Shut out of ordinary politics.

Rodriguez: “none of the traditional indicia of suspectness.”

Three tiers, and who sits in each

The test comes from the class.

STRICT

Compelling interest; narrowly tailored.

Race; national origin; alienage (States).

INTERMEDIATE

Important interest; substantially related.

Sex; nonmarital birth.

RATIONAL BASIS

Legitimate interest; rationally related.

Age; disability; wealth; the rest.

Never placed: sexual orientation, transgender status.

Sex: from Reed to Morales-Santana

How sex got its own tier.

1971

Reed: a male preference is arbitrary.

1973

Frontiero: four votes for strict scrutiny.

1976

Craig: the intermediate test.

1996

Virginia: “exceedingly persuasive.”

2017

Morales-Santana: stereotypes in citizenship law.

Frontiero: “romantic paternalism” put women “not on a pedestal, but in a cage.”

Craig v. Boren: the middle tier

Oklahoma, 1976. Beer, and the statistics behind a stereotype.

THE LAW

- 3.2% beer: men at 21.
- Women at 18.

THE STATE'S NUMBERS

- Arrested: 2% of young men.
- And 0.18% of young women.

Classifications by gender “must serve important governmental objectives and must be substantially related to achievement of those objectives.”

United States v. Virginia, 1996

The Virginia Military Institute admits only men.

VIRGINIA'S REASONS

- Diversity of approaches.
- The adversative method.

THE COURT

- Not the real purpose.
- Some women can do it.

THE REMEDY

- A separate program.
- Not equal.

“The justification must be genuine, not hypothesized or invented post hoc in response to litigation.”

Real differences, and remedies

When a sex classification survives.

WEBSTER, 1977

- A benefit formula favors women.
- Upheld: a remedy.

MICHAEL M., 1981

- Statutory rape: men only.
- Upheld: pregnancy.

ROSTKER, 1981

- Draft registration: men only.
- Upheld: combat rules.

Michael M.: “the sexes are not similarly situated in certain circumstances.”

Morales-Santana: equal, then leveled down

Citizenship for a child born abroad to one citizen parent.

THE STATUTE

- Unwed fathers: ten years' presence.
- Unwed mothers: one year.

THE COURT

- A stereotype: fathers “care little.”
- Remedy: the longer rule for all.

He won on equal protection, and still did not get citizenship.

Alienage: strict, with exceptions

State laws get strict scrutiny, unless the job is “governmental.”

1971

Graham:
welfare. Strict
scrutiny.

1973

Sugarman: civil
service. Struck.

1978

Foley: state
troopers.
Upheld.

1979

Ambach:
teachers.
Upheld.

1982

Cabell:
probation
officers. Upheld.

Graham: noncitizens are “a prime example of a ‘discrete and insular’ minority.”

Plyler v. Doe, 1982

Texas withholds public schooling from undocumented children.

NOT HEIGHTENED

- Status is not suspect.
- Education is not fundamental.

STILL STRUCK

- The children are not to blame.
- The harm lasts a lifetime.

Rational only if it “furthers some substantial goal of the State.”

Age, disability and wealth

Three classes the Court declined to protect.

AGE • MURGIA

- Police retire at 50.
- Upheld: old age is not insular.

DISABILITY • CLEBURNE

- Not quasi-suspect.
- Permit denial struck anyway.

WEALTH • RODRIGUEZ

- Unequal school funding.
- Upheld: not suspect.

Cleburne: rational basis, applied with a bite.

Sexual orientation: Romer and after

Struck under rational basis. The tier never named.

ROMER, 1996

- Colorado bars all protection.
- Struck: animus, no fit.

AFTER ROMER

- Windsor; Obergefell.
- No tier ever named.

Romer: “a classification of persons undertaken for its own sake.”

Skrmetti: what is a sex classification?

Tennessee, 2025. Medical treatment for minors.

THE LINES

- Age: minors, not adults.
- Medical use: some purposes.

THE COURT, 6-3

- Not a sex classification.
- Rational basis: upheld.

“This Court has never suggested that mere reference to sex is sufficient to trigger heightened scrutiny.”

Current case: West Virginia v. B.P.J.

Girls' and women's sports, limited by biological sex.

TITLE IX

- “Sex” means biological sex.
- Separate teams are lawful.

EQUAL PROTECTION

- Intermediate scrutiny applies.
- Safety and fairness: satisfied.

Twenty-seven States have such laws. The Court upheld two of them, 6–3.

B.P.J.: must the fit be exact?

The majority and the dissent read the same cases.

THE MAJORITY

- No person-by-person comparison.
- Science disputed: legislatures decide.

THE DISSENT

- Some girls may not fit the premise.
- Find the facts first.

Sotomayor, J.: “Perhaps West Virginia could meet those demands. Perhaps not.”

For discussion: five measures

A hypothetical. Every case in this module is in play.

THE MEASURES

- Women's chess: biological females.
- No noncitizen counselors.
- No police recruits over 35.
- Tuition without proof of status.
- Permits for one kind of group home.

QUESTIONS FOR DISCUSSION

1. Which classification?
2. A governmental function?
3. Any real argument?
4. Plyler, or not?
5. A bite in rational basis?

Module 11A on one slide

One line per rule.

THE LINE, ONE RULE AT A TIME

- Sex: important interest, substantial fit (Craig).
- The reason must be genuine (Virginia).
- Noncitizens: strict, except governmental jobs (Graham).
- Age, disability, wealth: rational basis.
- Sexual orientation, transgender status: no tier yet.
- Classification first (Skrimetti; B.P.J.).

Step 1 does as much work as the tier.