Classifications and Standards of Review

A laypersons guide to understanding legal terms pertinent to the Equal Rights Amendment

Equal Rights Amendment:

Section1: Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

Section2: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section3: This amendment shall take effect two years after the date of ratification.

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Classification defines a group with a common trait.

Standard of Review refers to the test, weight, or **scrutiny** the court gives to laws that pertain specifically to a particular classification in order to determine whether the law is just and/or constitutional. Currently the court uses three – they are: **rational-basis scrutiny**, **strict scrutiny,** and the more recent **intermediate scrutiny.** These standards are not in the Constitution. They have been developed over time, through case law.

Rational-basis scrutiny is the lowest or the easiest standard for a law to pass. The court uses this test to review laws pertaining to social and economic regulations. These are laws that cover people of various **ages** or people who are engaged in **occupations** requiring licensing, and **activities** that are licensed or regulated. Examples are: school attendance, driving, and mandatory seatbelts for car occupants. If challenged, the court requires the law to be **reasonable** and be "rationally related" to a legitimate governmental interest.

Strict Scrutiny is the highest test or standard of review and is the most difficult for a law to pass. Strict Scrutiny is used to consider classifications called **suspect.**

Suspect Classifications are: **Race, Religion, and National Origin.** The Court requires a law to be **exceedingly persuasive** and demonstrate a **compelling state interest**. This means there must be an extremely good reason to uphold a law based on one of these classifications.

Sex or gender classification has a mixed history with regard to the standard of review used by the courts.
Rational-basis scrutiny was used exclusively from time the Constitution was adopted, in 1789, until 1976. During the 19th and most of the 20th Centuries, rational-basis allowed the courts to decide sex discrimination cases according to norms that society considered acceptable for women. Thus court decisions denying women the right to vote, practice law, serve on juries, or work as bartenders, etc. were considered "rationally reasonable".
Note: Although 19th Amendment, introduced the word sex into the Constitution, in 1920, it applies only to the right to vote. Voting is the only constitutionally protected right that women have.

CASE LAW: GENDER CLASSIFICATION AND INTERMEDIATE SCRUTINY

***Reed v Reed,* 404 U.S. 71 (1971)** This was the first successful challenge to a gender classification and definitely sparked a period of judicial interest in this particular classification. However the law was struck down because it did not meet a rational basis test. Justice Burger said the question at issue was "whether a difference in the sex of competing applicants [bears] a rational relationship to a state objective.

Note: Congress was debating The Equal Rights Amendment in 1971, and many believe the debate influenced the Court's reasoning.

***Frontiero v Richardson*, 411 U.S. 677 (1973)** Justice Brennan attempted to have the Supreme Court declare sex a suspect classification because "sex is an immutable characteristic. A plurality of the Court acknowledged that, "Our Nation has had a long and unfortunate history of sex discrimination." However, in a 5-4 decision, the Court declined to rule sex as suspect saying, "The proposed Equal Rights Amendment will decide this question."

Craig v Boren, 429 U.S. 190 (1976) Ruth Bader Ginsburg argued that sex warranted a higher standard of review than rational-basis and convinced the Court to move the level of scrutiny for gender classifications to Intermediate Scrutiny.

Intermediate Scrutiny. While intermediate scrutiny is an improvement, it does not make sex a suspect classification that would receive the strict scrutiny reserved for race, religion, and national origin.

United States v Virginia et al., Petitioners (1996): In a 5-4 decision the Supreme Court allowed women to enter the all-male Virginia Military Institute (VMI). Justice Ruth Bader Ginsburg, in the majority opinion, referred to **skeptical-scrutiny.** This is a stricter standard of review than intermediate scrutiny. It would appear that Ginsburg is attempting to edge the Court closer to considering sex as suspect. However, such a Supreme Court declaration will never have the force of a constitutional amendment nor a guarantee that future courts will use the higher standard of review and not revert to the lower rational-basis.

In fact, ever since the *Craig v Boren*, the Court has used various standards of review when considering sex discrimination cases. An amicus Brief to the Court in *United States v Commonwealth of Virginia et al* by the ACLU points out:

> Intermediate scrutiny is an "unworkable half measure" that has led to inconsistent and unfavorable results in lower courts such as validating Virginia laws based on gender.

The capriciousness of the Court is clearly described by Justice Antonin Scalia in his dissent of the VMI decision. Scalia writes:

> I shall devote most of my analysis to evaluating the Court's opinion on the basis of our current equal-protection jurisprudence, which regards this Court as free to evaluate everything under the sun by applying one of three tests: "rational basis" scrutiny, intermediate scrutiny, or strict scrutiny. These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case. (Emphasis added.)

Further on, Justice Scalia, a so-called strict constructionist, chillingly illustrates how precarious women's rights are without a constitutional guarantee:

> "More specifically, it is my view, that when a practice not expressly prohibited by the text of the Bill of rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down."

In 2011, Justice Scalia made it even clearer that there is no protection against sex discrimination in the Constitution.

> "Certainly the constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that's what it means."

In a more positive vein, Justice Ginsburg has written: With the Equal Rights Amendment, we may expect Congress and the state legislatures to undertake in earnest, systematically and pervasively, the law revision so long deferred. And in the event of legislative default the courts will have an unassailable basis for applying the bedrock principal: All men and all women are created equal. (Emphasis added.)

Conclusion: The U.S. Supreme Court discriminates by using a lower standard of review to decide sex discrimination cases than it does for discrimination cases based race, religion, or national origin. Only the Equal Rights Amendment can guarantee that sex will be considered a suspect classification entitled to the same strict scrutiny.

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