

Exam ID: 611
Course: Con Law
Professor Name: Shanor
Exam Date: Wednesday, May 03, 2006

1.1. Gambrell violating the 14th? In determining whether EPC is violated, we must first look to see whether there is a suspect classification (Sally Student) or a fundamental right in question (education). Race is the original suspect classification and is not in question. Based on Carolene Products, the question is whether Sally Student satisfies the idea of a “discrete and insular minority” which she does not. Wealth (or being poor) is not a suspect classification so assuming being in a run-down school is a circumstance of poverty, based on Rodriguez, her poverty level does not make her a suspect classification. The type of education that Sally receives is not a fundamental right (note: education is obviously not mentioned in the text of the constitution as a fundame) based on Rodriguez as well. As such, she will most likely not be viewed as a suspect class and the law will get rational basis review.

Is education a fundamental right? Based on Rodriguez (education not a fundamental right) and Plyler (whether you’re getting any education at all), education can rise to a quasi-fundamental right that, with other factors to be discussed below, can raise the level of scrutiny beyond rational basis. SS would need to show that she is not getting any education at all because of VEA, not just that it is diminished and it appears that SS’ school looks a lot like Rodriguez’s school so it would be difficult for her to get education as a quasi-fundamental right. But if she could argue that her poverty level is similar to the illegal immigrant status in Plyler and that her lack of education is similar there as well (again, unlikely), the combination of a quasi-suspect class with a quasi-fundamental right might trigger intermediate scrutiny.

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In *Romers*, the court did not declare homosexuals to be a discrete and insular minority worthy of suspect class status so they only applied rational basis review. However, the “rational basis” review looked a lot like intermediate scrutiny review afforded to laws affecting gender differently (or as Scalia put it, rational basis with “teeth”) so SS should try to show the exact opposite sort of bias (state sponsored bias based on heterosexuality rather than homosexuality) in order to get a bit of a stricter test done on her case. But based on the majority opinion citing that “harming a politically unpopular group cannot constitute legitimate government interest” SS would have a difficult time portraying herself as politically unpopular unless she can try to call the combination of her poverty and gender enough to reach the hurdle but that is unlikely).

That being said, there may be several ways that SS can actually get to the level of intermediate scrutiny. First, she could argue that there is gender discrimination as this triggers intermediate scrutiny (*Craig v. Boren*). While homosexuality has not been looked at the same as gender in court opinions, transgendered teens getting certain benefits may help SS’s argument. Like there, it is actually a more dominant gender (females over transgendered) based on societal status getting hurt by the law. Here gender issues are in fact a concern but they are not necessarily central (as I’m guessing gay teens are much more predominant and the intended targets of this education than transgendered teens) to the argument. The second way to trigger intermediate scrutiny was mentioned above, based on *Plyler*.

Or SS can argue that this is more like affirmative action than it is about sexuality and, like in *Adarand* where quotas for minorities were viewed as unconstitutional, the

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exclusive quotas given to alternative teens is also unconstitutional. She can argue based on Bollinger that diversity is a compelling governmental interest (so her "straightness" is diversity) and the Gambrell is making the school nondiverse. Under the affirmative action argument, SS's EPC rights would be violated because there is a quota system that even goes further beyond the mere point systems at U of M so she would be excluded. There is a chance the court would use this analysis.

Rational Basis: Under rational basis review, the classification must be rationally related to some legitimate state interest--> there is a means to the end. Here, the government's interest seems legitimate (unlike Cleburne) as it cites suicide statistics etc so it would pass normally rational basis review.

Intermediate: Is this law substantially related to an important governmental interest. If the interest is truly an equal education for everyone in the state, then this law is not relatively narrowly tailored to meet this goal as SS is being excluded. It seems here that stereotypes based on unidentified "studies" might be giving the alternative teens better education while arguably taking away funds from SS (sort of a reverse stereotype argument from Boren). Under US. v. Virginia, the standard of "exceedingly persuasive" would make it that much more likely that VEA would violate the EPC.

Strict Scrutiny: Only if SS can make an affirmative action analogy could she argue for strict scrutiny for the VEA (and it was discussed above).

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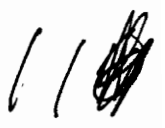
1.2. Commerce Clause: Under the commerce clause, Congress has the power to “regulate” commerce among the several states. The first step here is to see if this federal law runs afoul of the 10th amendment’s implied restrictions on federal authority. First, is this a generally applicable law? It appears here that Congress is singling out the states, as opposed to private schools or other private citizens, because it does not appear to affect private schools (ones that do not get federal funding). This is more similar to *NY v. US* than it is to *Garcia* (where regulations were on private employers as well) because it is only apply to the states. However, the idea of conditional spending, under *Dole*, might be an appropriate way to get around the concept that perhaps this is commandeering the states. There, funding was not that rationally related between drinking age and highway funds and the courts still found it was appropriate. In this circumstance, I would say there will be an accountability problem for the political heat from a perhaps unpopular decision (*NY v. US*). Education is something implicit in the Constitution and thus the states have the crux of the control over the issue and it looks like the fed government overstepped its bounds. Still, it deserves analysis on whether it regulates commerce itself.

Under the commerce clause itself, the question is whether the legislation regulates channels, instrumentalities or something substantially effecting ISC. This is certainly not a channel or instrumentality of interstate commerce (not a road, railroad, etc) so we look to substantial effects. Now the *Lopez* factors can be used to see substantial effects or not. The activity that is trying to be regulated is sexual preference which doesn’t look like a traditional idea of commerce or economic activity for sure. Congress does say that these schools “harm the national economy” but there is no specific finding that Congress cites

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to support this beyond their word alone. Under Morrison, findings alone wouldn't even be enough but under Wickard and Heart of Atlanta they did help. Again, here there do not seem to be any particular findings, but, rather, a broad blanket statement of effect on the national economy. 2) This is an area of state concern traditionally so under Lopez, the area of education is less likely to allow impediment like this by the federal government. The link between education and ISC is probably too far attenuated to be acceptable. 3) Is there a jurisdictional nexus here? Under Lopez, if guns traveled through Isc then perhaps it would be okay for the fed gov to act, but here, unless traveling from state to state for a gay education would be an acceptable analogy there does not seem to be okay. Although, here there could be coordination problems where travel does in fact happen by homosexual teenagers for this type of education and this type of travel and subsequent spending could make a causal enough link for ISC.

Like Morrison where violence was too attenuated a link to ISC, I think homosexuality and education would follow a similar logic. There needs to be some limit to Congressional powers based on the ISC as Lopez and Morrison demonstrated, and I believe this law would be another case of the SC limiting Congress' power.



b) Under the spending clause, Congress has the ability to condition the receipt of federal money by the states on the condition that the money be spent a certain way (not regulating for the general welfare but on taxing and spending). Most notably, Congress can specify a condition but not a regulation, unless it falls under Congress's delegated powers (which is not the case here)

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SD v. Dole sets a basic framework for proper analysis. 1) Is this spending for the general welfare? Normally the court is deferential to Congress because it is "the voice of the people" so the VEA's condition that "No federal school funding shall be provided to any state that employs a student's sexual preference or orientation as a factor for admission to any public school," will probably be given deference (especially under Scalia/Thomas' view of deference) unless they view it as only for the welfare of straight students and not for the welfare of homosexual students and thus not for the "general welfare". 2) The condition must be unambiguous. Here, there is no question: sexual preference cannot play a role in admission to a school. 3) The condition must be related to the spending, within a related nexus. The VEA provides a closer link than even Dole does. In this case, if the state does not comply with conditions for education, education money will be withheld where in Dole it was highway funds for the drinking age. However, the VEA may be looked at as coercion of the states because, assuming federal dollars to schools is a significant part of their budgets, the state has no choice but to comply if it wants to continue providing any education at all. Ultimately, states must have a choice in the matter and here it appears that the proverbial gun is being held to the heads of states so it looks more like commandeering and coercion than a voluntary decision on losing just a little bit of funding for doing what the states think is socially right. 4) Is there an independent Const. bar? Again, there is nothing explicit in the Constitution so it would appear to be a field for the states and cutting off funding would appear to be coercion.

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3) 14th: First, although the 14th amendment originally only applied to the states, it has been incorporated as a requirement for the federal government as well. Congress does not have the power to redefine the scope of the rights protected by the Civil War Amendments in a way that is different from the way the SC would define their scope. However, Congress can seek to remedy or prevent constitutional violations. This must be done in a congruent and proportional way. In *Boerne*, the SC rejected the substantive theory of allowing Congress leeway in making substantive changes in Constitutional law (from *Katzenbach*) and now allows for only remedial and preventative authority to be exercised.

Proportional and Congruent: 1) Is there discrimination occurring that is unconstitutional? THE VEA is an attempt to counter discrimination for homosexuals, but it is still legislating based on discrimination based on sexually so the analysis is the same. Circles—with the outer circle being what the act declares illegal and the inner circle being what is unconstitutional—help analogize the situation. In the outer circle here is making sexual preference a factor at all in school admissions. In the inner circle, are purposeful discrimination based on sexual preference. Here, there seems to be a pretty tight fit so it appears that, although this is reverse discrimination, it is unconstitutional (Just like affirmative action is held to the same standard as racial discrimination). However, it can be distinguished from *Boerne*, and *Garrett* and made to look more like *Katzenbach* (which is still good law) because here, like if all were given literacy tests, all students are being judged on the same criteria.

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Next, the court will look to see if there's legislative record revealing the pattern of unconstitutional behavior of the state. Assuming Congress has documented that states have made these magnet schools, there would be an appropriate legislative record. Next, there is the countervailing interests of deference to Congress and the Court's role of policing Congress (Garrett) and its role of interpreting the Constitution. Here, it appears to be almost the opposite situation of *Romers v. Evan* where the court found that morality in and of itself was not enough of a reason to pass anti-gay legislation. In this case, the states have stated what they believe to be a legitimate interest for its actions so it is unclear whether the court will feel that it has already ruled on this issue and Congress is trying to go around them. Ultimately, this does seem to be a new issue altogether so the court might give deference to Congress.

Recently in *Tennessee v. Lane*, the court gave a slightly nuanced approach to these issues, but restricted the scope of their ruling to primary governmental functions (courts) so it is debatable if the ruling would extend out so far to include schooling even though it is not an explicit/fundamental right in the Constitution. First, the court would identify the scope of the right (as discussed as a quasi-fundamental right under *Plyler*). Next, the court looks to see if there's adequate proof and here is where Congress seems to come up short unless it has documented the school cases and the unconstitutionality of them.

Finally, for both *Boerne* and *Lane*, is this congruent and proportional. This seems to be unproportional because it cuts off all federal funding for something so necessary as education because of one factor in admissions to public schools. Cutting off some

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funding may be more proportional as this seems excessive. Additionally, Congress cuts off funds for any state if sexual orientation is even a factor while the schools like GLBT are using it as the exclusive factor so there does appear to be a middle ground (between the leave it or take it all approach of both Congress and states like Gambrell with schools like GLBT) that would be more appropriate as a remedial response.

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2. The first question to ask here is whether it is a fundamental right under the Constitution being violated here by SAPA? Of course, the answer depends what right we're talking about. The right can be described most specifically as the right to have an abortion (or to choose) or more broadly as a right for both the doctors and the patients to engage in free speech. The latter is clearly a fundamental right that is expressed in no uncertain terms in the text of the Constitution in the first amendment. Under that analysis, strict scrutiny would obviously be applied. However, since that has not been the focus of our Con. Discussions, I will explore whether abortion is considered a fundamental right.

Abortion is not explicitly a fundamental right in the text of the Constitution. However, based on Goldberg's concurrence in Griswold, there are more fundamental rights, based on the 9th amendment, then are just outlined in the Bill of Rights and this applies to the states through the 14th amendment. Still, the right to choose does not appear to be a fundamental right based on the text of the constitution.

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We next look to precedent. Eisenstadt and Griswold may suggest that there is a fundamental right to control reproduction. Under Blackmun's opinion in Roe, the 14th amendment is broad enough to encompass a woman's decision of whether or not to terminate her pregnancy. Under Casey, it is still left unclear whether abortion is a fundamental right. Instead, the court seems to take a middle of the road analysis by not looking at the law under strict scrutiny or under rational basis; rather they make up the new "undue burden test" (the majority does appear to agree with Blackmun, but there is no explicit statement about how the right is construed).

Under "undue burden" a provision of the law is invalid if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability. New Hope could argue that all it was doing here is creating structural mechanisms by which its expressing its antiabortion stance. However, not allowing a pre-viability abortion after the GDR is more than a structural mechanism unless New Hope can argue that this is the same idea as informed consent. A mother has the option of whether to know the sex of her child and only at that point is the state cutting off her ability for an abortion. Therefore, it ultimately is the woman's choice to make (I don't think the court would accept this argument). Note, Section 5 of SAPA is essential based on Stenberg because a maternal health exceptions must exist and outlawing post-viability abortions is acceptable (dating back to Roe and it hasn't been overturned). Even though New Hope relies on localized studies, not national studies, which is part of the basis for Croson (I think it was Croson) under EP laws, it would not seem to affect the analysis for abortions and the undue burden test. However, with the recent conservative change in the

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court, there is a chance that a study such as this and the state's interest in the law may be enough to countervene and increase the hoops through which prospective mothers must jump before getting an abortion, even if the court, based on precedent and the reliance on the current standard that women have, does not overturn Roe and Casey themselves. Still, this study and outlawing abortions based on sex may open a slippery slope that justices do not want to get tangled in for their abortion analyses.

PP: She would have to argue (and probably successfully) that when she signed the form, it was not informed consent. Additionally, the reason why she wants an abortion is not at all at issue in the passing of SAPA so she is an unfortunate overincluded individual in this situation: she doesn't want an abortion because of sex of the child but because of personal calamities. Similarly to Stenberg where two procedures were outlawed because of ambiguity where only one abortion procedure really was intended, this statute is targeting people who want abortions for reasons wholly aside from sex of the child. It would be interesting to know the gender of PP's child in order to make a truly defined argument as to why this is overinclusive.

LL: LL is more the target of the legislation than PP because sex of the child is the all-important factor in her decision. She would certainly argue (and again, probably successfully) that under the current standards set forth by Casey that this is much more than informed consent, information from a doctor (it's actually restricting information from a doctor), and a waiting period. Because even making a woman tell her husband about the abortion is an undue burden, actually restricting a woman from having

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an abortion merely because she wants to know the gender will probably be viewed as that much larger of a burden.

It appears that SAPA places undue burdens on both LL and PP and will thus be ruled unconstitutional. However, if the court is looking to chip away at Roe and Casey, this could be an opportunity to begin that process.

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3. The MCA violates the DCC if it 1) regulates commerce and either a) discriminates against out of state businesses, which presents issues of protectionism and Balkanization or b) unduly burdens interstate commerce.

This act regulates commerce. The commercial nature of both the trees being used to make viable real estate and its oils being shipped across the US make it clearly ISC because it substantially affects ISC.

MCA is per se unconstitutional if it facially discriminates against out of state businesses unless FL has a truly legitimate reason for its discrimination like the health and safety of its citizens. This statute appears to be on its face discriminatory based on sections 3 and 4. It says that only FL residents can cultivate and harvest the trees and only

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allows an FL company, owned by the state, to process the oils. Based on *Phil v. NJ*, there is a strong presumption against states that discriminate against out of staters. There it was for garbage not being allowed in from out of state, which New Jersey “cultivates” while here it is for trees in the Everglades which Florida cultivates so there is a humorous analogy (to a degree). FL’s main argument will of course be that the law is necessary for the health and safety of its citizens although this argument will be a stretch. Certainly FL has a strong state interest in preserving the Everglades and reducing the number of *Melaleuca* trees in the Everglades in part 1, but there is no general safety rationale for why only FL residents and an FL company should make the money for the trees. Under *Maine v. Taylor*, FL can try to argue that this is a “quarantine” (for at least part 1) but, still, the rest of the statute appears per se discriminatory against out of staters and for the only reason of having FL residents profit. MCA appears to be facially discriminatory and thus per se unconstitutional.

Still, I will briefly conduct the balancing test between local benefits vs. burdens of ISC that would be conducted on a facially neutral statute because if FL can argue that it is facially neutral, it is not per se unconstitutional and it could argue for a market participant exception.

Facially neutral: FL can try to argue that is facially neutral and thus the law would be presumed to be okay unless it imposed a clearly excessive burden on out of staters in relation to the local benefits. 1) State interest? FL clearly has an interest in preserving the Everglades so this law matches that part. 2) Is the regulation rationally related to that end? Parts 1 and 2 make no mention of citizenship and seem to go expressly towards the

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goal of both preserving the Everglades and profiting from the trees that are already in FL. Considering the court gives deference here, these would be acceptable regulations. But like *Carbone*, though, parts 3 and 4 give a balkanizing effect because out of staters here are being discriminated against from getting any of the profits from the trees on land that Florida owns. For parts 3 and 4, it would appear that the regulation does not outweigh the burden on ISC.

However, parts 3 and 4 might fall under the market participant exception. 1) A state can affect the market it participates in only, not the related markets (South Central Timber). There the state was participating in the sale but not in the processing of the timber; here, FL is participating in cultivation, harvesting, and processing so the state may be okay.

2) If it's a downstream regulation, then the market participant exception does not apply. Here, there does not appear to be downstream regulation as FL, unlike in *Carbone*, is participating through the processing stage.

Under *Hughes*, the state can favor its own residents when participating (like in the 4th section). Under *White*, when the state is acting as a participant, it can choose who works on its products so section 3 would be acceptable.

FL must get based the face of the statute and to the possibilities of market participant exceptions if it wants the statute to be constitutional under the Dormant Commerce Clause.

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