

Equal Protection Analysis - Strict Scrutiny

Suspect Classifications:

- Race
- National Origin
- Alienage, when done by states only
 - [Since it's the job of the federal government to regulate immigration, federal rules discriminating on the basis of citizenship will be allowed unless unreasonable, but it's not a state's job to regulate immigration, so a state can't discriminate on this basis unless it passes strict scrutiny.]

Exception: participants in state government or state peace officers

Burden of proof is on the government to prove that the law is narrowly tailored (necessary) to achieve a compelling government interest

Equal Protection Analysis - Strict Scrutiny

- Burden of proof is on the government to prove that the law is narrowly tailored (necessary) to achieve a compelling government interest.
- Courts have wide discretion to “cure” past racial discrimination, especially in the field of public education; remedies include busing etc.
 - Brown v. Board of Ed. is still an open case!
- Rules that have a discriminatory effect do not get strict scrutiny; only those that have a discriminatory purpose get strict scrutiny; though, a judge or jury can sometime use discriminatory effect to prove the existence of a discriminatory purpose
 - **Discriminatory application** of a facially neutral law can cause strict scrutiny to apply!

The Strict Scrutiny Effect

- Most of the time, strict scrutiny means that a law will be struck down.
- Rules that have **passed strict scrutiny** include:
 - The Korematsu case (Japanese American internment camp case)
 - Certain cases of remedial (“benign”) discrimination

Affirmative Action

Question - Should “benign” discrimination (i.e., which was intended to remedy past discrimination) also get strict scrutiny?

- In 1990, the Supreme Court ruled that medium scrutiny applies to federal affirmative action programs.
- In 1992, the Supreme Court ruled that strict scrutiny applies to state affirmative action programs.
- In 1995, the Supreme Court ruled that strict scrutiny applies to federal affirmative action programs; overruling the 1990 case.

Affirmative Action after Aderand

Thus, *all policies or rules that discriminate on the basis of race will get strict scrutiny!!*

This includes state college admissions, state contracting jobs etc. Thus any such classification must be narrowly tailored to achieve a compelling government interest in order to stand!

The image features a white background with a pattern of light blue, semi-transparent circles of various sizes scattered across it. The top and bottom edges of the image are framed by a solid dark blue border.

QUIZ TIME!

Affirmative Action Programs Today

The following have been held to constitute “compelling government interests:

- remedying past discrimination within that jurisdiction
(remedying general past discrimination is not good enough)
- diversity in public education

➤ **Remember that if a regulation wants to address these areas, it still must be the least restrictive way of doing so (i.e., it must be narrowly tailored).**

Affirmative Action - Examples

■ **Allowed affirmative action examples:**

- state schools may consider the race of college applicants for purposes of maintaining a diverse student body
- hiring minority applicants over more qualified non-minority applicants in order to remedy past discrimination by that same agency

■ **Struck down affirmative action examples:**

- firing white teachers with more seniority to maintain ethnic balance in a school system
- strict quotas or set asides for university classes or contracting jobs