WHY THE 14TH AMENDMENT ISN'T ENOUGH.

A PRIMER ON 14TH AMENDMENT CASE LAW AS TO SEX DISCRIMINATION[1]

STEVEN A. ANDERSSON[2] AND MAX SHARKEY[3]

OCTOBER 1ST, 2021

SUMMARY:

The legal protections from discrimination based on Race versus Sex are distinctly different. Sex discrimination review is explicitly weaker than racial discrimination review. Racial discrimination has been given the highest level of review to eliminate this scourge. Despite this level of scrutiny, it hasn't completely worked (that may be an understatement). To anyone who would suggest that sex discrimination could be eliminated by using a lower standard of review is fooling themselves. The answer is, at a minimum, to bring the standard of review for sex based discrimination to the same level as that of race discrimination. The passage of the ERA will do exactly that.

INTRODUCTION:

While the 14th Amendment case law does convey some protections against discrimination based on Sex (for both women and men), those decisions are limited in scope.

The text of Section 1 of the 14th Amendment to the Constitution reads as follows:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

This language has been explained and interpreted by the Judiciary for over 100 years. The cases that have been decided have developed a particular rubric for "how" a decision gets made. It goes without saying that the Courts do not simply decide a case based on the jurists particular inclinations on the policy issue. This would turn the 3rd branch into a "super-legislature."

THE THEORY:

That rubric or methodology for evaluating Constitutional claims has specific criteria for evaluating particular law that is being challenged.

They are as follows:

---

[1] This Primer is not intended as legal advice. Citations for the assertions herein are available if requested, but generally omitted for ease of reading. The purpose of this paper is a general outline of the stages and principles in a 14th amendment case review.

[2] Representative Steven A. Andersson (Retired) JD 1992, Chief Republican Co-Sponsor of Illinois Joint Resolution SJRCA4 successfully ratifying the ERA in Illinois 2018.

[3] Max Sharkey, J.D. Student Northern Illinois University School of Law

1) Is government action involved or is this purely private actions?

2) What form of discrimination is implicated?

a) Race based discrimination (strongest review – Strict Scrutiny)

b) Sex based discrimination (less strong – Intermediate Scrutiny)

c) Not based on a protected classification such as race or sex. (Weak - Rational Basis Review)

3) Is the law presumed valid or invalid?

1) State vs. Private Action: The Fourteenth Amendment, by its terms, limits discrimination only by governmental entities, not by private parties. It is clear that the actions of state officers and agents are attributable to the state. Moreover, the doctrine goes further to establish that the fact that the "state action" category is not limited to situations in which state law affirmatively authorizes discriminatory action. While this can be a nuanced area of law, the main purpose is to distinguish between purely private relationships (contractual or otherwise) and those involving the State or State actors.[4]

An example is that a person, who owns a private golf course on their own property, may deny access to that golf course based on, for example, race, without violating the 14th amendment. However, if that same golf course is on public property, such racial discrimination would be state action and would be covered by the 14th Amendment.

2) What type of Discrimination is claimed?

The courts have determined that the review of a law depends on the type of discrimination it purports to allow.

If the challenged law is based on Race, it is subject to "**strict scrutiny**."

If the challenged law is based on Sex, (and a few other classifications not implicated here), it is subject to "**intermediate scrutiny**."

If the law challenged is based on neither of the above to two classifications (or others not implicated here), it is subject to "**Rational Basis Review**."

So, what do each of theses terms mean?

---

[4] Considering the recent Texas law known as SB8 (Abortion Private Bounty Hunter bill), it is worthy to note here that a private actor that uses the State Court system to enforce a law that violates the constitution can be deemed a state actor. In Shelley v. Kraemer, 334 U.S. 1 (1948). Property owners brought suit to enforce a racially restrictive covenant, seeking to enjoin the sale of a home by white sellers to black buyers. The covenants standing alone, Chief Justice Vinson said, violated no rights protected by the Fourteenth Amendment. However, "the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements." (emphasis added) Establishing that judicial action of state courts was state action, the Court found that judicial enforcement of these covenants was forbidden by the 14th Amendment.

The highest form of scrutiny is "Strict Scrutiny." This means that any law, to be upheld as constitutional, even though it does discriminate, must pass the following tests:

a) The law must have a 1) "compelling governmental interest" and 2) must be written in such a way as to be "narrowly tailored" to achieve that interest and 3) it cannot be achieved with any less discriminatory alternative. 4) The interest must be actual and not merely theoretical. It must address a real and present problem.

The middle lesser form of scrutiny is "Intermediate Scrutiny." This means that any law, to be upheld as constitutional, even though it does discriminate, must pass the following tests:

b) The law must have 1) an "important governmental interest" and 2) must use means that are "substantially related" to that interest. 3) The interest must be genuine and not merely a after the fact justification for a law.

The lowest form of scrutiny is "Rational Basis Review." This means that any law, to be upheld as constitutional, even though it does discriminate, must pass the following tests:

c) The law must 1) have a "legitimate state interest" and 2) there must be a "rational connection" between the law's means to achieve that interest. The interest can be theoretical, not an actual or even intended interest.

3) Is the burden of proof of these cases on the government or the person challenging the law?

It depends on the standard of review from the above section. What this means in simpler terms, is, in a close case, the person with the burden of proof will generally lose the case. Converted to numbers, the person with the burden is required to prove its case by 50.1% or more. So if a person is challenging a law, their hope would be that the burden is on the government and not the individual.

a) Strict Scrutiny (Race) the burden of proof is on the Government.

b) Intermediate Scrutiny (Sex) the burden of proof is on the Government

c) Rational basis Review (other non protected classes) the burden is on the person challenging the law.[5]

APPLICATION OF THEORY TO REAL CASES:

Many of the terms used above seem very similar and not subject to precise. How does one distinguish a "compelling" interest from an "important" one? The terms could arguably be synonyms for each other in certain contexts. This is a fair criticism. In practice, the best way is to compare actual cases that meet or fail to meet the various standards.

- *Examples of Cases that fail under the Strict Scrutiny Standard:*

[5] Admittedly, the standard is the same between Race and Sex discrimination, but is included for purposes of completeness.

Segregation in courtrooms is unlawful and furthers no compelling state interest. Treatment of parties or witnesses in judicial actions based on their race is impermissible. Statutes forbidding marriage between persons of different races are unconstitutional.

- *Examples of Cases that pass under the strict Scrutiny Standard:*

The most notable of these classes of cases are based on Affirmative Action. When applying the above criterion, it was concluded that eliminating historic and long standing discrimination that adversely affected persons of color was a compelling interest and by doing so in a limited way that does not overly burden non-persons of color, was narrowly tailored to the interest. Thus what amounted to a beneficial form of discrimination was deemed permissible considering the huge amount of discrimination persons of color had suffered over hundreds of years.

- *Examples of Cases that fail under the Intermediate Scrutiny Standard:*

Alimony obligations upon males but not upon females, Courts acknowledged that assisting needy spouses was a legitimate and important governmental objective (thus apparently passing the first test of a compelling governmental interest). The Court considered whether sex was a sufficiently accurate proxy for dependency, and, if it found that it was, then it would have concluded that the classification valid. However, the Court observed that the state already conducted individualized hearings with respect to alleged need. So during those hearings if men needed assistance, they could be identified and helped. The use of the sex standard as a proxy, therefore, was not justified. So this case failed on the second prong (Least restrictive means to achieve the compelling interest). But what is important to note is that the court was considering allowing this sort of sex based discrimination on the presumption men were the "Breadwinners." Only the requirement of individual case review prohibited this law from being upheld and enforced. It was dangerously close to allowing this discrimination based on stereotypical notions.

- *Examples of Cases that pass (and thus **allow discrimination based on sex**) under the Intermediate Standard:*

A Georgia statute was upheld that permitted the mother of an illegitimate child to sue for the wrongful death of the child but that allowed the father to sue only if he had legitimated the child and there is no mother.

A Federal statute was upheld that required that, in order for an illegitimate child born overseas to gain citizenship, a citizen father, unlike a citizen mother, must acknowledge or legitimate the child before the child's 18th birthday.

Federal statutes were upheld that provided for registration only of males for a possible future military draft, excluding women altogether and limiting women from combat roles. An important effect of this decision is that in the Military, combat experience is essentially required for advancement to the highest ranks. By prohibiting women from serving in combat roles, it has created glass ceiling for women's careers in the military.

A California state statute involved the constitutionality of a statute that punished males, but not females, for having sexual intercourse with a non-spousal person less than 18 years of age.

Justices agreed that although the law was founded on a clear sex distinction, it was justified because it served an important governmental interest— the prevention of teenage pregnancies. Inasmuch as women may become pregnant and men may not, women would be better deterred by that biological fact, and men needed the additional legal deterrence of a criminal penalty.

There are many more examples, but this gives flavor of the permissible sex discrimination.

We would challenge anyone to suggest the cases would have been permitted to stand under strict scrutiny if the terms "men and women" were changed to "black and white" persons.

- *Cases that pass under Rational Basis Review*:

Virtually all cases pass review under this standard. Some have opined that Rationale Basis Review is so weak it effectively has no teeth.

ADDITIONAL DATA:

When sex discrimination claims were evaluated with the intermediate standard the likelihood the alleged victim would prevail is 47% whereas under rational basis this percentage is lowered to 20% according to Lee Epstein, etc. al. in Constitutional Sex Discrimination, 1 TENN. J.L. & POL'Y 11, 67 (2004).Victims of sex discrimination would have a higher percentage of prevailing if the standard was raised to strict scrutiny.

But that begs the question, why is sex discrimination not considered under the suspect classes? Is there a legitimate reason for it to have a lower standard? To qualify as a suspect class the court has determined it needs to meet certain factors. These include, "the person has an inherent trait, whether the person has a trait that is highly visible, whether the person is part of a class which has been disadvantaged historically, and whether the person is part of a group that has historically lacked effective representation in the political process." This list is not exhaustive, but it is usually what the court uses when justifying a suspect class.

When looking at sex discrimination, it appears these factors have been met. First, an inherent trait, one's sex and one's gender appear to be inherent traits, sex incorporating certain biological aspects of an individual and gender applying those biological aspects to gendered norms. Whether appropriate or not, society appears to point to individuals and inherently appears to assign traits to them based on their perception of sex and gender. Second, these traits are highly visible in society both to one's gender expression and the assumptions society places on one because of their gender. Third, there is no question about the historical oppression of sex and gender minorities in this country and, indeed throughout history, from coverture laws to women not gaining the right to vote until the 1920s, historically women have been seen as "the other" when compared to men. Finally, historically women have lacked effective representation in the political process. Although getting the right to vote in 1920 according to the history of the United States House of Representatives website, "[s]ince 1917, when Representative Jeannette Rankin of Montana became the first woman to serve in Congress, a total of 395 women have served as U.S. Representatives, Delegates, or Senators." To put that in perspective, there are 435 members of the House of Representatives alone. From 1917 to the present, there have been fewer women that have served in either body of Congress than are seated in one session of the

House of Representatives. Therefore, the question remains if the criterion is met, why is sex discrimination not a suspect class as the late Justice Ruth Bader Ginsberg along with Justices Brennan, Marshall, White, and Douglas believed it should be in the case of Frontiero v. Richardson, 411 U.S. 677 (1973).

CONCLUSION: It is legally inaccurate and indefensible to argue that women and men are protected from discrimination based on the 14th Amendment in the same manner as race discrimination. The protections are substantially weaker. Sex discrimination should undeniably and without question have the same level of protection as race. The ERA will cure this defect.

Additional reading is recommended at https://www.law.cornell.edu/constitution-conan/amendment-14/section-1