

ESSAY QUESTION NO. 7

Answer this question in booklet No. 7

Bob operates a fishing guide business from a property he owns on the Kenai River. Because he owns private land abutting a river, Bob is a riparian owner. To access the river for his business, Bob has constructed a floating dock on the river. The State of Alaska owns the riverbed below the high water mark.

Alaska law authorizes the Department of Natural Resources (DNR) to charge riparian owners rent when the owner constructs a dock over state-owned riverbeds and directs DNR to maximize revenues. The law exempts from the rent requirement all riparian owners who do not engage in commercial activity on their dock, and calculates rent based on the revenue of the commercial activity. In addition, the law exempts commercial owners who reside within any area designated as a distressed economic zone. The purpose of this exemption is to assist the economically disadvantaged residents of a distressed economic zone. Bob's property is in such a zone, but Bob does not reside there and he therefore does not qualify for that exemption. There are other guides who own property on the river and reside in the distressed economic zone who do qualify for the exemption. Administration of the rent program does generate revenue for the state, but can also be costly.

Pursuant to Alaska law and regulations, DNR gives appropriate notice to Bob that, pursuant to regulation, it will assess the fair market value of the rent owed to DNR. In a letter, Bob refuses to pay any rent, explaining that if non-commercial owners and resident commercial owners are exempt from the rent requirement, it would be unfair to require Bob to pay rent on his dock. Bob notes in his letter that he does not believe other non-exempt guides on the river pay rent to DNR and that he thinks DNR is unfairly singling him out. DNR responds, explaining that if Bob does not pay the rent DNR charges him that DNR will sue him for it.

1. Bob comes to you for legal advice. He wants to know whether the Alaska Constitution protects him from having to pay rent to DNR. What would you tell him and why?

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CONSTITUTIONAL LAW

Bob may have a state equal protection argument against having to pay DNR rent, as well as an argument under the Uniform Application Clause of the Alaska Constitution. Although DNR's exemption for non-commercial riparian owners is probably valid, and although Bob probably cannot establish a selective enforcement claim, DNR's regional exemption for residents of the distressed economic zone is probably invalid under both the Equal Protection and the Uniform Application Clauses of the Alaska Constitution. The examinee's ultimate conclusion is less important than the quality and depth of analysis and knowledge of the applicable tests under the Equal Protection and Uniform Application Clauses.

Under the Equal Rights and Opportunities Clause of the Alaska Constitution, article I, section 1, "all persons are equal and entitled to equal rights, opportunities, and protection under the law...." Under the Uniform Application Clause of the Alaska Constitution, article VIII, section 17, "Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation."

I. State Equal Protection Test (20 points)

Alaska courts have long interpreted Alaska's equal protection guarantee to provide more stringent protection than the federal equal protection clause. In order to implement Alaska's more stringent equal protection standard, the Alaska Supreme Court has adopted a "three-step, sliding-scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interest at stake."¹ To establish an equal protection violation, a person must first demonstrate that the challenged state action treats similarly situated persons differently.² Without disparate treatment of similarly situated persons, there can be no violation of equal protection. If the party asserting an equal protection violation does not establish disparate treatment of similarly situated persons, there is no need to engage in the sliding-scale analysis.³ If the party does establish disparate treatment, then that treatment is subject to Alaska's equal protection analysis.

First, it must be determined at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review.... Depending upon the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation.

¹ Alaska Civil Liberties Union v. State, 122 P.3d 781, 787 (Alaska 2005) (citing Malabed v. North Slope Borough, 70 P.3d 416, 420-21 (Alaska 2003)).

² Id.

³ Id.

Second, an examination must be undertaken of the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.

Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken. Once again, the state's burden will differ in accordance with the determination of the level of scrutiny under the first stage of analysis. At the low end of the sliding scale, [the court has] held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between means and ends must be much closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.^[4]

A. Nature of the Interest Affected

The first step of equal protection analysis requires determination of the nature of the interest involved. If the interest affected involves a fundamental right, then strict scrutiny is applied.⁵ If the interest affected is “important,” then a court will apply close scrutiny.⁶ An example of an “important” right or interest is the “right to engage in an economic endeavor within a particular industry.”⁷ Government action affecting an economic interest receives minimum scrutiny.⁸

B. Governmental Interest and the Relationship Between the Interest and the Means Chosen to Advance Them.

The next step of equal protection analysis requires consideration of the governmental interests at stake and the means chosen to advance them. To survive strict scrutiny, a classification must “be narrowly tailored to promote a compelling governmental interest and be the least restrictive means available to vindicate that interest.”⁹ Under close scrutiny, the state’s interest must be not only legitimate, but important, and the nexus between the enactment and the important interest to be served must be close.¹⁰ Under minimum scrutiny, the interest need only be legitimate.¹¹ Under minimum scrutiny, there must be a fair and substantial relationship between the means (i.e. the classification) and the purposes of the legislation or governmental action.¹²

Analysis (55 points)

⁴ Id. at 789 (quoting *Matanuska Susitna Borough Sch. Dist. v. State*, 391, 396-97 (Alaska 1997).

⁵ *State v. Planned Parenthood*, 28 P.3d 904, 909 (Alaska 2001).

⁶ *Malabed*, 70 P.3d at 421.

⁷ Id.

⁸ *Alaska Civil Liberties Union*, 122 P.3d at 790.

⁹ *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 266 (Alaska 2004).

¹⁰ *Malabed*, 70 P.3d at 421.

¹¹ *Alaska Civil Liberties Union*, 122 P.3d at 790.

¹² Id.

II. Is Bob Similarly Situated?

A. Exemption of Non-Commercial Riparian Owners

The exemption of non-commercial riparian owners probably does not violate equal protection.¹³ The Alaska Supreme Court has held in various contexts that people who use state lands for different purposes are not “similarly situated” for purposes of constitutional analysis.¹⁴ The court has held that commercial and non-commercial riparian landowners are not similarly situated and the DNR may treat them differently without giving rise to an equal protection violation.¹⁵ Charging rent to commercial riparian owners based on the fact that commercial owners are generating revenue is thus a valid method for distinguishing between riparian landowners and does not give rise to an equal protection problem.

B. Selective Enforcement

Bob contends that he is similarly situated to other commercial users, and that the DNR’s enforcement of the rent requirement against Bob and not those other operations is therefore subject to equal protection analysis. However, DNR’s uneven enforcement of the rent requirement is also unlikely to violate equal protection. Selective enforcement of an otherwise legitimate law can give rise to an equal protection violation if it “is part of a deliberate and intentional plan to discriminate based on an arbitrary or unjustifiable classification.”¹⁶ But, standing alone, mere failure to enforce a law against others similarly situated does not give rise to a claim for equal protection.¹⁷ Instead, a plaintiff must present affirmative evidence of discriminatory intent.¹⁸ If Bob has affirmative evidence of discriminatory intent, he might be able to prove an equal protection violation. However, Bob’s assertion that he is being singled out appears to be conclusory and not supported by evidence. The state, on the other hand, will likely be able to argue that the administrative costs associated with the rent program prevent it from enforcing the rent requirement against every commercial riparian landowner, because the program can be costly to administer.

C. Regional Exemption

Bob can probably establish that he is similarly situated to other commercial riparian owners who live within the regional exemption area. In *State v. Enserch Alaska Construction, Inc.*¹⁹ the Alaska Supreme Court invalidated a regional hiring preference on equal protection

¹³ *State v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1219-20 (Alaska 2010) (holding that exemption of non-commercial riparian owners from leasing requirement does not violate equal protection).

¹⁴ See *Tongass Sport Fishing Ass’n v. State*, 866 P.2d 1314, 1318 (Alaska 1994) (holding sport and commercial fishermen not similarly situated); *Reichmann v. State*, 917 P.2d 1197, 1200 (Alaska 1996) (residential and recreational purchasers of land not similarly situated); *Shepherd v. State*, 897 P.2d 33, 43-44 (Alaska 1995) (Alaska resident and non-resident hunters not similarly situated).

¹⁵ *Alaska Riverways, Inc.*, 232 P.3d at 1220.

¹⁶ *Id.* (citing *Gates v. City of Tenakee Springs*, 822 P.2d 455, 461 (Alaska 1991)).

¹⁷ *Luper v. City of Wasilla*, 215 P.3d 342, 348 (Alaska 2009).

¹⁸ *Rollins v. State, Dept. of Rev.*, 991 P.2 202, 210 (Alaska 1991).

¹⁹ 787 P.2d 624 (Alaska 1989).

grounds. The court did not explicitly address whether the plaintiff and others residing within the regional preference zone were similarly situated, instead addressing the three-part equal protection test directly.²⁰ Similarly, in *McDowell v. State*²¹ the Alaska Supreme Court invalidated a rural subsistence preference based on the Uniform Application Clause of Article VIII, section 17, which only applies to similarly situated people.²²

D. Application of the Three-Part Test to Bob's Potential Claims

The only element of the rent program that probably raises equal protection issues is the exemption for residents of the economically distressed zone because Bob is similarly situated to other commercial riparian owners who live in the economically distressed zone. The first consideration, then, is the nature of the private interest affected by the law. On one hand, Bob's private interest is arguably merely an economic one, and subject therefore only to minimum scrutiny. Under minimum scrutiny, the governmental interest need only be legitimate.²³ Under minimum scrutiny, there must be a fair and substantial relationship between the means (i.e. the classification) and the purposes of the legislation or governmental action.²⁴ As discussed below, because the enactment involves natural resources, it should be subject to mid-level scrutiny. However, even under minimum scrutiny, the enactment likely does not survive equal protection analysis.

This is because the purpose of the regional exemption, which is ostensibly to assist economically disadvantaged residents of the distressed economic zone, is probably not a legitimate goal. The Alaska Supreme Court has struck down similar preferences designed to assist economically disadvantaged residents of a particular area, explaining that economically assisting one class over another is not a legitimate goal.²⁵

Even if the goal was legitimate, the law would probably still fail because the law does not bear a fair and substantial relationship to the goal because it is both under- and over-inclusive. The law distinguishes only between residents and non-residents of the economically disadvantaged zone, and does not require any showing that a particular person is economically disadvantaged or would be subject to a hardship in order to obtain the exemption. And, it makes no exception for economically distressed individuals residing in a region not deemed economically distressed.

For the foregoing reasons, the regional exemption is probably not valid under Alaska's Equal Protection Clause. As discussed below, the regional exemption is probably invalid under

²⁰ Id. at 633-34.

²¹ 785 P.2d 1 (Alaska 1989).

²² Id. at 10-12. See also, *State v. Kenaitze Indian Tribe*, 894 P.2d 632, 638 (Alaska 1995) (striking down as unconstitutional law establishing subsistence preference based on domicile).

²³ *Alaska Civil Liberties Union*, 122 P.3d at 909.

²⁴ Id.

²⁵ *State v. Enserch Alaska Construction, Inc.*, 787 P.2d 624, 634 (Alaska 1989) (holding that "disparate treatment of unemployed workers in one region in order to confer an economic benefit on similarly situated workers in another region is not a legitimate legislative goal"). See also *Malabed v. North Slope Borough*, 70 P.3d 416, 421-22 (Alaska 2003) (striking down native hiring preference by North Slope Borough).

the Uniform Application Clause and its requirement of close scrutiny. Note that an examinee could come to an alternate conclusion and receive substantial credit for the quality of the analysis.

E. Substantive Due Process

An applicant may address, and should be given credit for addressing, whether the regional exemption violates Bob's substantive due process rights. However, a response that focuses solely on the equal protection issue should not receive fewer points as a result of that focus. This question was intended to elicit an equal protection response, but those applicants who address the substantive due process issues implicated should receive credit for their analysis.

The constitutional guarantee of substantive due process assures that a legislative body's decision is not arbitrary but instead based on some rational policy. If any conceivable legitimate public policy for the enactment is either apparent or offered by those defending the enactment, the party challenging it must disprove the factual basis for the justification.²⁶

When a law places substantial burdens on the exercise of a fundamental right, the state must articulate a compelling [state] interest and demonstrate "the absence of a less restrictive means to advance [that] interest."²⁷ Given the similarities between the state equal protection and substantive due process analyses, an applicant's substantive due process should track the equal protection analysis.

III. Uniform Application Clause (25 points)

The Uniform Application Clause provides that "[l]aws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation."²⁸ In light of the constitutional importance of citizens' equal access to natural resources established by this clause, Alaska courts require legislation dealing with natural resources to satisfy a heightened level of equal protection scrutiny.²⁹ But these protections only extend to those similarly situated; a conclusion that two classes are not similarly situated "necessarily implies that the different legal treatment of the two classes is justified by the differences between the two classes."³⁰ If however the two classes are similarly situated, then "the purpose of the burden must be at least important. The means used to accomplish the purpose must be designed for the least possible infringement on article VIII's open access values."³¹

²⁶ Anderson v. State ex rel. Cent. Bering Sea Fishermen's Ass'n, 78 P.3d 710, 716 (Alaska 2003)

²⁷ Huffman v. State, 204 P.3d 339, 345-46 (Alaska 2009).

²⁸ Alaska Const. art. VIII, § 17.

²⁹ Baxley v. State, 958 P.2d 422, 429 (Alaska 1998).

³⁰ Id. (quoting Shepherd v. State, 897 P.2d 33, 44 n. 12 (Alaska 1995).

³¹ McDowell v. State, 785 P.2d 1, 11 (Alaska 1989).

As discussed in the previous section, Bob is similarly situated to commercial riparian owners who live within the economically distressed zone for purposes of the exemption. Because the rent program relates to natural resources, it should be subject to heightened scrutiny. Because, as discussed above, the state goal of conferring an economic benefit on commercial riparian owners who reside in one area over commercial riparian owners who live in another area is not even legitimate, it matters not whether the fit between the objective and the enactment is close.

An examinee may come to a different conclusion and still receive substantial credit for his/her analysis.