

In order to foster an environment conducive to learning, a school board enacted a dress code that prohibited all public high school students from wearing in school shorts cut above the knee. Because female students at the school considered it unfashionable to wear shorts cut at or below the knee, they no longer wore shorts to school. On the other hand, male students at the school regularly wore shorts cut at or below the knee because they considered such shorts to be fashionable.

Female students sued to challenge the constitutionality of the dress code on the ground that it denied them the equal protection of the laws.

Should the court uphold the dress code?

- A. No, because the dress code is not necessary to further a compelling state interest.
- B. No, because the dress code is not substantially related to an important state interest.
- C. Yes, because the dress code is narrowly tailored to further an important state interest.
- D. Yes, because the dress code is rationally related to a legitimate state interest.

## Explanation:

### Types of discrimination

Type	Description	Proof of intent
<b>Facially discriminatory</b>	<ul style="list-style-type: none"><li>• Language of law distinguishes between classes of persons</li><li>• Eg, law states "all state employees must be male"</li></ul>	<ul style="list-style-type: none"><li>• Discriminatory intent presumed</li></ul>
<b>Discriminatory application</b>	<ul style="list-style-type: none"><li>• Facially neutral law applied differently to different classes of persons</li><li>• Eg, state hires only male applicants</li></ul>	<ul style="list-style-type: none"><li>• Purposeful discrimination</li><li>• Eg, female applicants equally qualified</li></ul>
<b>Discriminatory impact</b>	<ul style="list-style-type: none"><li>• Law neutral on its face &amp; in its application, but disproportionately impacts particular class</li><li>• Eg, 6' height requirement mostly affects female applicants</li></ul>	<ul style="list-style-type: none"><li>• Purposeful discrimination</li><li>• Eg, legislative history shows intent to exclude female applicants</li></ul>

Discriminatory government regulations are permissible so long as they withstand **equal protection** review. The **default standard** is **rational basis** review, which requires the challenging party to show that the regulation is not rationally related to any legitimate government interest. But a **heightened standard** of review applies when the challenger proves that the government **intentionally discriminated** against a **quasi-suspect class or suspect class** (or substantially impacted a **fundamental right**).

Here, the dress code is not facially discriminatory since it applies to "all public high school students." Nor is it discriminatory in its application since the dress code is applied equally to male and female students. And though it has a discriminatory impact on female students, there is no evidence that the school board *intentionally* targeted that quasi-suspect class. Therefore, the court will apply rational basis review and uphold the dress code since it is rationally related to the school's legitimate interest in fostering an environment conducive to learning.

**(Choice A)** Proof that a regulation is necessary to further a compelling state interest (ie, strict scrutiny) is required when the regulation intentionally discriminates against a suspect class or substantially impacts a fundamental right—neither of which is implicated here.

**(Choice B)** A regulation must be substantially related to an important state interest (ie, intermediate scrutiny) when the regulation *intentionally* discriminates against a quasi-suspect class (ie, sex/gender, legitimacy). Here, the dress code may discriminate based on gender, but that discrimination was not intentional.

**(Choice C)** There is no level of scrutiny requiring that a regulation be *narrowly tailored* to further an *important* state interest.

**Educational objective:**

A law that discriminates—on its face, in its application, or in its impact—against a quasi-suspect class or suspect class will only be subject to heightened scrutiny if the government engaged in *intentional* discrimination.

**References**

- Washington v. Davis, 426 U.S. 229, 242 (1976) (laws that disproportionately impact a protected class are unconstitutional if the government acted intentionally).

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