

FEBRUARY 2003 CONSTITUTIONAL LAW QUESTION

Paul, a student at Rural State University (“Rural”), wishes to sue Rural, a public school, for violation of his rights under the U.S. Constitution because Rural refused to select him for its cheerleading squad solely on the basis that he is a male. Paul is indigent, however, and cannot afford to pay the costs of suit, including filing and service of process fees.

State law permits court commissioners to grant a prospective state court litigant permission to proceed *in forma pauperis*, which exempts the litigant from any requirement to pay filing and service of process fees. Paul applied for permission to proceed *in forma pauperis*. At a hearing, the state court commissioner conceded that Rural’s refusal to select Paul was constitutionally discriminatory, but nevertheless denied Paul’s application on the ground that Paul’s prospective lawsuit “involves merely cheerleading.”

What arguments could Paul reasonably make that the denial of his *in forma pauperis* application violated his rights under the U.S. Constitution, and what is the likely outcome? Discuss.

Answer A to Question 5

Paul has a claim that the commissioner's decision violated his procedural due process rights and his First Amendment rights. An individual's procedural due process rights have been violated when he or she is denied a life, liberty, or property right in that due process of law. To succeed, Paul must demonstrate that his claim that his substantive due process rights were violated when he was the victim of gender discrimination was a life, liberty or property right which he was denied, and that the process by which that right was denied was inadequate when balanced with the state's interest in efficiency and fairness.

Paul's right to pursue his claim was not a right to life or liberty. Arguably, however, he has a property right to his claim. Typically, whether or not one has a property right depends on whether a property interest has vested (for instance, at will federal employees do not have a vested property interest in their jobs, but contractual employees do). Here, Paul's claim vested where his job due process rights were violated. At that time, his standing to indicate his rights became ripe. Arguably, his ability to indicate his claim is a vested property right, which was undeniably denied by the commissioner. The state may suspend process in denying rights only in emergency situations but no emergency existed here. Thus, in order to constitutionally deny Paul's property right, the state must exercise due process.

There is some question as to what process is due. An indigent individual may not be denied fundamental rights because of their indigent status, but because indigency itself is not a suspect class entitled to constitutional protection, the state may deny other privileges to the indigent so long as its means are rationally related to its purpose in doing so. For example, marriage and divorce are fundamental rights, and so an indigent individual may not be denied his or her right to marry or divorce based on an inability to pay a filing fee. However, this is not a fundamental right to declare bankruptcy, or another example, and as a person's bankruptcy petition may be denied on the basis of their inability to pay a filing fee. Here, Paul is unable to pay filing fees associated with filing his claim of gender discrimination, a substantive due process claim, in state court. The issue is whether his right to bring suit is a fundamental one. It is certainly outside the scope of the fundamental rights recognized by the courts in their interpretation of the Constitution, which typically involves privacy issues such as family rights (marriage, divorce) and bodily integrity (medical care, abortion). However, Paul's right to bring suit is undoubtedly very important, though not fundamental. So, the process in denying him his right must be balanced against his important rights.

State law permits commissioners to grant or deny prospective litigants the ability to

proceed in forma pauperis at their sole discretion, but in a hearing. A court-like hearing, in which the applicant is permitted to present evidence and argument, is typically sufficient to preserve procedural due process. What is troubling about this situation, however, is that the state commissioner is able to single-handedly, and arbitrarily, determine who may and who may not proceed to the courthouse door.

In a first amendment situation, where free speech is the issue, such sole discretion on the part of a state official, able to grant or deny permits to speak or gather in public, for example, is unconstitutional as an impermissible prior restraint on speech. The state may regulate speech in a public forum so long as the regulation is not based on the expression content or viewpoint, and in a non-public forum (which is open to some types of speech, but not others) so long as its regulation is not based on viewpoint. The courthouse, arguably, is a non-public forum, which is open to some types of speech, but not others. For example, it is appropriate to have arguments in an appropriately filed lawsuit, but not to hear a lawsuit in which the court has no jurisdiction, or to hear a poetry reading, or to hear a rock concert, or an anti-war demonstration. The state may regulate the types of speech that are heard in that forum, but not the viewpoint — it may not decide to hear one side as an appropriately filed suit and not the other, as an example. Here, the state commissioner is able, in the commissioner's sole discretion, to determine which litigants may be heard and may not be heard in a non-public forum. The commissioner even stated that Paul's case was valid — so it would otherwise be appropriate to be heard, but for the commissioner's sole opinion that "it involves merely cheerleading." This arbitrary decision violated Paul's first amendment rights, in denying him equal access to a non-public forum and the basis of his viewpoint, and it denied him his procedural due process in providing him with a forum inadequate to protect his very important right to see his substantive due process rights indicated.

Unfortunately, with the procedures in place, to bring suit against the state for these new violations of his procedural due process rights and his first amendment rights, Paul must go through the same procedure — in order to bring suit to indicate his rights, he must either pay the filing fee or present his case to the commissioner, but the very commissioner whose position violated his procedural due process and first amendment rights in the suit he is attempting to bring. He will be successful in indicating his rights, but he should bring suit in federal court, instead. (Though he can't sue the state in federal court for money damages, under the 11th Amendment, he must seek an injunction or sue the commissioner in his individual capacity, instead.)

The state's system at granting permission to litigants to file suit regardless of whether or not their underlying claims are valid and they have standing, also raises equal protection concerns. This system does not discriminate against indigent individuals per

se (they are not entirely prohibited from filing suit) and indigency is not a suspect class under substantive due process, so a substantive due process claim is not appropriate. However, the state system is denying a right to a certain class of individuals, raising an equal protection question. Filing a lawsuit is not a fundamentally protected right under equal protection, as are some privacy rights. However, participating in a non-public form is, arguably, a fundamental right, as recognized by the First Amendment. If so, the state must show that this screening process is necessary to protect a compelling state interest; a showing that is likely impossible under these circumstances. (Lightening the loads of the courts, preventing frivolous claims and requiring filing fees for all but the most essential of lawsuits might be admirable state interests, but none are compelling.) And, the discriminatory way in which this system operates, by permitting a single hearing officer in his sole discretion to determine what are important and what are unimportant rights, is not an appropriate method of seeing those interests, even under rational basis scrutiny simply because that system, in itself, is violative of the First Amendment and Procedural Due Process. Though Paul's right to sue is not fundamental under substantive due process, he may also have a valid equal protection claim.

Answer B to Question 5

Under the Constitution, an indigent's inability to pay filing and service of process fees will not prevent him from being able to vindicate a fundamental right through the courts. In situations such [as] a termination of parental rights, for example, the indigent's costs will be borne by the state, because the right to raise one's child is considered a sufficiently important interest.

In determining whether the denial of the in forma pauperis application violated Paul's constitutional rights, the threshold question will be whether Paul's interest in freedom from gender discrimination is a sufficiently fundamental interest to allow him to proceed in forma pauperis. Paul will likely raise arguments based on the 14th Amendment - - specifically procedural due process, substantive due process, and equal protection. Because the principal actor here is the State of Rural (the State University [sic] in excluding him from the cheerleading squad, and state commissioner in denying his in forma pauperis petition), the state action requirement of the 14th Amendment has been met.

Paul's Underlying Claim

Paul's underlying claim is most obviously supported by the Equal Protection clause of the 14th Amendment; indeed, the state commissioner has already acknowledged that Paul's constitutional rights have been violated. If Paul becomes able to proceed with his claim, the court will find that the state university's [sic] cheerleading program discriminates on the basis of a quasi-suspect classification-- gender. The government will be unable to show that the discrimination is substantially related to an important government interest, or supported by an exceedingly persuasive justification, as they are required to do. Keeping a state cheerleading squad all female is hardly and [sic] important government interest, and possibly not even supported by a rational basis.

It is therefore clear that Paul's constitutional rights have been violated. The question is whether the interest he seeks to vindicate is important enough to compel the government to pay his litigation costs.

Procedural Due Process

Paul will first claim that the state accorded him insufficient process in denying his in forma pauperis petition. The denial of the petition will effectively preclude Paul from filing a lawsuit to enforce his constitutional rights, and this is sufficient to constitute a liberty interest. Paul is therefore entitled to some process before it is taken away. In

order to determine how much process is required, the three “Eldredge factors” are considered: the importance of the right being protected, the value of additional procedural safeguards, and the government’s interest in efficiency.

In terms of the right being protected: it is not, as the state commissioner described it, the right to engage in “merely cheerleading.” Rather, it is the right to be free from gender discrimination, and the right to enforce that guarantee in the courts. His interest is therefore considerably less trivial than the commissioner has intimated.

Paul’s problem arises from the second two factors: the value of additional safeguards, and the government’s interest in efficiency. Paul has already been given a hearing here, and that is likely to constitute sufficient process. It’s difficult to see what more process he could receive without seriously implicating the government efficiency prong. Therefore he will be found to have received sufficient process.

Equal Protection--14th Amendment

Paul will also assert that in denying his in forma pauperis petition, the state has denied him equal protection under the laws.

Paul may argue that the fact that the commissioner has seemingly wide discretion to grant in forma pauperis petitions constitutes an equal protection violation. However, as long as the commissioner acts consistently and operates within a set of specific guidelines this argument is likely to be unsuccessful.

Suspect Classification

The next question is whether there is a suspect or quasi-suspect classification at work here, which would trigger strict or intermediate scrutiny by the courts. Paul may argue that preventing indigents from filing a lawsuit to vindicate their constitutional rights discriminates on the basis of poverty. However, poverty is not a suspect classification, so the state will merely need to show that its actions are rationally related to a legitimate government interest. Here, the government interest would be in preserving its resources while still allowing access to the courts for those asserting the most fundamental of rights. Providing limitations on in forma pauperis petitions is rationally related to this interest.

Fundamental Rights – Possibly First Amendment

Paul may next argue that a fundamental right has been violated. Paul is actually

seeking to vindicate a right within a right here — he seeks access to the courts, to enforce the underlying constitutional right. So determining whether his right to access to the court has been violated depends on how the underlying right is characterized. Access to the courts in itself is not a fundamental right; however, if the underlying right is fundamental, the access becomes a protectable interest.

Paul's underlying interest might first be characterized as a right to be free from gender discrimination. But this in itself is not a fundamental right, and is more properly analyzed under a suspect classification analysis.

Paul may have more luck arguing that the exclusion from the cheerleading squad on the basis of gender (and then his inability to enforce the right in court) violates his First Amendment Rights of free expression and possibly even free association. First Amendment Rights are in fact considered fundamental rights for purposes of 14th Amendment equal protection analysis. The state appears to have no compelling justification for curtailing the rights of males to join the cheerleading squad, to thereby express their school spirit, and associate with others of like mind.

Because free expression and free association are fundamental rights for purposes of the 14th Amendment, Paul should be allowed to proceed in forma pauperis to attempt to vindicate those rights.

Substantive Due Process

The substantive due process analysis turns on whether a fundamental right is implicated. The analysis mirrors the fundamental rights analysis under the Equal Protection clause. Again, we are required to consider Paul's "claim-within-a-claim": his seeking access to the courts to vindicate an underlying right. And again, if the underlying right is described as a First Amendment Right, the denial of his in forma pauperis petition was unconstitutional.