



## CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW

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# *WEBINAR OUTLINE*

## *CONSTITUTIONAL LAW: DUE PROCESS*

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### Hierarchy of Authority

- Official's pronouncement
- Outcome in prior cases (practice)
- Internal memoranda/guidance (policy)
- Administrative precedent decisions
- Regulations
- Statute
- Constitution (also, duty to avoid question)

### Bread-and-Butter theories

- Administrative position violative of regulation
- Administrative policy, practice or regulation not statutorily authorized
- *But see Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984)
- Administrative position irrational (denial of equal protection)
- Insufficient process (denial of due process)

### Source of Equal Protection

## 14th Amendment - Applies to States

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.**

## 5th Amendment

The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)

## CALIFORNIA CONSTITUTION - ARTICLE 1 DECLARATION OF RIGHTS

**SEC. 7. (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws;** provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation.

## Equal protection

General principle: similarly situated individuals must be accorded similar treatment *unless some legitimate purpose is served by disparate treatment.*

Hierarchy of scrutiny - Federal:

- Rational basis
- Intermediate scrutiny
- Strict scrutiny

### Rational Basis

We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

*Romer v. Evans*, 517 U.S. 620, 631 (1996)

### Intermediate Scrutiny

Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.... To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.

*Clark v. Jeter*, 486 U.S. 456, 461 (1988)

*Plyer v Doe*

[A]ll persons within the territory of the United States, including aliens unlawfully present, may invoke the Fifth and Sixth Amendments to challenge actions of the Federal Government, we reasoned from the understanding that the

Fourteenth Amendment was designed to afford its protection to all within the boundaries of a State.

457 U.S. 212 (1982).

### Strict Scrutiny

Under the strict scrutiny test, a statute must be narrowly tailored to further a compelling governmental interest in order to survive.

*Shaw v. Hunt*, 517 U.S. 899, 908 (1996).

## Equal Protection in California

- Rational Basis
- Strict Scrutiny
- No “Intermediate Scrutiny” - Strict Scrutiny is Applied.

### Rational Basis in California

[T]he basic and conventional standard for reviewing economic and social welfare legislation in which there is a ‘discrimination’ or differentiation of treatment between classes or individuals. . . . [That standard] invests legislation involving such differentiated treatment with a presumption of constitutionality and ‘requir[es] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose.’ . . . [T]he burden of demonstrating the invalidity of a classification under this standard rests squarely upon the party who assails it.’ This first basic equal protection standard generally is referred to as the ‘rational relationship’ or ‘rational basis’ standard. *In re Marriage Cases*, (2008) 43 Cal. 4th 757, 832

### Strict Scrutiny in California

[T]he second equal protection standard is ‘[a] more stringent test [that] is applied . . . in cases involving ‘suspect classifications’ or touching on ‘fundamental interests.’ Here the courts adopt ‘an attitude of active and critical analysis, subjecting the classifications to strict scrutiny. . . . Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.’ [Citation.]’ This second standard generally is referred to as the ‘strict scrutiny’ standard.

*Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 299.

## No Intermediate Scrutiny

Past California decisions, by contrast, have applied the strict scrutiny standard when evaluating discriminatory classifications based on sex (*see, e.g., Sail'er Inn, supra*, 5 Cal.3d 1, 15–20; *Arp v. Workers' Comp. Appeals Bd.* (1977) 19 Cal. 3d 395, 400 [138 Cal. Rptr. 293, 563 P.2d 849]; *Michael M. v. Superior Court* (1979) 25 Cal.3d 608, 610–611 [159 Cal. Rptr. 340, 601 P.2d 572]; *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 564 [10 Cal. Rptr. 3d 283, 85 P.3d 67]), and have not applied an intermediate scrutiny standard under equal protection principles in any case involving a suspect (or quasi-suspect) classification. *In re Marriage Cases*, (2008) 43 Cal. 4th 757, 832. fn. 55.

## Determining level of scrutiny

Basis of disparate treatment (characteristics of disadvantaged group)

- Impacted right
- Enumerated
- Unenumerated

## Civil Rights Act of 1871

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Equal Protection and Welfare Benefits

## Invidious Discrimination

*Dandridge v. Williams*, - an upper limit on the amount of welfare benefits that a family could receive did not violate the Equal Protection Clause of the Fourteenth Amendment. The Court ruled that the law did not violate the Equal Protection Clause because it was free from “invidious discrimination,” and it reasonably worked to further the state's interest of “encouraging

employment and in maintaining an equitable balance between welfare families and the families of the working poor.”

397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970).

### Residency Requirement

*Saenz v. Roe*, struck down a California law that limited new residents to the amount of welfare benefits they would have received in the state of their prior residence. Tied to Right to Travel “the state’s legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens.” Citizens, regardless of their incomes, have the right to choose to be citizens of the state in which they reside. The states, however, “do not have any right to select their citizens.”

526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999).

#### a. FACIAL Classifications

- i. **Race:** SS (*Korematsu, Adarand*)
- ii. **Sex:** IS/EPJ (IS: *Craig*, EPJ: *Hogan, VMI*). Real differences: IS (*Michael M., Rostker*). Or redefine classification so not sex: RR (*Parham*)
- iii. **Illegitimacy:** IS
- iv. **Poverty:** RR (*San Antonio*)
- v. **Disability:** RR (*Cleburne*)
- vi. **Sexual Orientation:** RR (*Romer, Goodridge*) – still do HS analysis
- vii. **New Classification?** Argue for heightened scrutiny. Three step inquiry:
  1. history of discrimination
  2. political powerlessness
  3. immutability/no relation to ability to perform
  4. (if necessary, *Carolene Products* “discrete and insular minority”)

#### b. NON-FACIAL Classifications

- i. Is there a discriminatory **effect** on a **race or sex** classification? (*Yick Wo, Gomillion*)
  1. something in fact pattern will generally show disparate impact.
- ii. Is there discriminatory **intent**? (*Palmer, Washington v. Davis*)
  1. P needs to show that the law/policy implemented *because of* and not *in spite of* the discriminatory outcome (*Washington v. Davis, Feeney*)
  2. **Ways to prove intent:** (laid out in *Arlington Heights*)
    - a. clear pattern unexplainable on other grounds (*Yick Wo, Gomillion*)

- b. historical background of decision (timing of decision, departures from normal procedure)
    - c. legislative history (*Moreno*; but see *Fletcher* (leg. history irrelevant, could be passed again with “pure motives”; intrusion into other branches))
  - 3. Once intent proven, burden of proof shifts to gov’t to prove non-discriminatory reason for implementing statute. (apply appropriate standard)
- iii. If not race or sex, apply RR. Look at who created the policy, whether groups are affected, and if there is a relationship b/t the policy and the goal of the policy. Is there animus (*Romer* – is the statute so broad that there’s no other explanation)?

*Washington v. Davis* (1976)

- police exam failing blacks at higher rate than whites
- facially neutral laws with disparate racial impact are unconstitutional only upon a showing that they are contaminated by discriminatory intent
- Court says no discriminatory intent even if there was disparate impact. Intent must be *because of*, not *in spite of* discriminatory impact
- no intent = RR. Policy upheld.

*VMI* (1996):

- State interest in having male-only military school:
  - Adversative method of teaching (S.Ct. rejects b/ c while most women won’t like adversative method, some women will like it → overbroad generalization)
  - Diversity of educational benefits (S.Ct. rejects b/ c was not propounded by VMI until after decision in *Hogan* came out)
- **Exceedingly persuasive justification:**
- VWIL program → inferior to VMI
- justification cannot be based on **overbroad generalizations**

*San Antonio Independent School District v. Rodriguez* (1973)

- Poor receiving education, just not receiving as good of an education as wealthier people
- EPC does not require absolute equality
- Education is NOT a fundamental right
- Court upholds practice under RR → court sees no wealth distinction/ discrimination and thus not subject to heightened scrutiny

### Equal Protection and Social Security

Indeed, as we have noted, those illegitimates statutorily deemed dependent are entitled to benefits regardless of whether they were living in, or had ever lived in, a dependent family setting with their disabled parent. Even if children might rationally be classified on the basis of whether they are dependent upon their disabled parent, the Act's definition of these two subclasses of illegitimates is "overinclusive" in that it benefits some children who are legitimated, or entitled to inherit, or illegitimate solely because of a defect in the marriage of their parents, but who are not dependent on their disabled parent. Conversely, the Act is "underinclusive" in that it conclusively excludes some illegitimates in appellants' subclass who are, in fact, dependent upon their disabled parent. Thus, for all that is shown in this record, the two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; **hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment.**

*Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974).

### Equal Protection and Food Stamps

Thus, in practical operation, the 1971 amendment excludes from participation in the food stamp program, not those persons who are 'likely to abuse the program' but, rather, only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility.

Traditional equal protection analysis does not require that every classification be drawn with precise mathematical nicety. But the classification here in issue is not only imprecise, it is wholly without any rational basis. The judgment of the District Court holding the 'unrelated person' provision invalid under the Due Process Clause of the Fifth Amendment is therefore affirmed.

*United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 533-534, 538 (U.S. 1973).

## Case development

- Select a plaintiff
- Make a record!
- Facts
- Evidentiary and other objections
- Exhaust administrative remedies
- Determine when and how to signal willingness to litigate
- Developing the theory
- Aim for the irrational
- Question/investigate even seemingly rational basis
- Unintended consequences
- Experts
- Statistics