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October 2013

Fundamentals of Constitutional Law for Legal Services Practitioners: Due Process and Equal Protection

This manual produced through grants from the State Bar Legal Services Trust Fund

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I. SOURCE OF DUE PROCESS AND EQUAL PROTECTION RIGHTS

A. 5th Amendment

"No person shall be … deprived of life, liberty, or property, without due process of law …"

B. 14th Amendment

Section. 1. "… 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."

C. Which amendment applies?

The Due Process Clause of the 5th Amendment applies only to the Federal Government. The 14th Amendment applies only to the States and their subdivisions (counties, cities, and their agencies). Both the 5th and the 14th Amendments provide that the government shall not take a person's "life, liberty, or property" without due process of law.

D. Are the due process protections different as applied to the federal versus state governments?

The Supreme Court has interpreted those two clauses identically. As Justice Felix Frankfurter once explained: "To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection."[1]

E. California Constitution

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.

F. Who must afford due process?

Both clauses only apply only to governmental actors, not private citizens.

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[1] *Malinski v. New York*, 324 U.S. 401, 415 (1945), (Frankfurter, J., concurring)

G. General principles of procedural due process

Procedural due process refers to the fairness and accuracy of the decision-making process. At a minimum, due process requires that an affected individual be given notice that government intends to take some action and an opportunity to be heard at a meaningful time and place. "The essential requirements of due process … are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985).

Notice. Notice must be reasonably designed to insure that affected persons will in fact learn of the proceedings in sufficient time to allow them to protect their interests.

Coherent standards.

Protected interest. In order for due process requirements to attach, the client must have at stake either a property interest (*i.e.*, a legal claim of entitlement) or a liberty interest. Liberty interests include physical freedom and freedom from certain types of stigma, such as those that impair one's ability to obtain employment.

1. What property interests are protected?

"Property interests" include ownership of tangible or intangible property, as well as statutorily created entitlements or rights. An abstract need or desire for a benefit is not enough. *Board of Regents v. Roth,* 408 U.S. 564 (1972); *Leis v. Flynt,* 439 U. S. 438 (1979).

Examples of protected property interests include—

(1) Public education. There is a property interest in public education when school attendance is required. Thus, a significant suspension triggers procedural due process. *Goss v. Lopez* 419 U.S. 565 (1975).

(2) Income-maintenance benefits. One has a protected property interest in welfare benefits, at least if the recipient has previously been found to meet eligibility criteria. *Goldberg v. Kelly* 397 U.S. 254, 262-264 (1970). There is also a protected interest in unemployment compensation, *Sherbert v. Verner*, 374 U.S. 398 (1963).

(3) Continued public employment. If a statute or ordinance creates a public employment contract, or there is some clear practice or mutual understanding that an employee may be terminated only for cause, there is a property interest in continued public employment. *Arnett v. Kennedy,* 416 U.S. 134 (1974). If the employee holds her position only at the will of the employer, no protected property interest exists. *Bishop v. Wood,* 426 U.S. 341 (1976); *compare Board of Regents v. Roth*, 408 U.S. 564 (1972) (terminating probationary teacher does not trigger due process).

(4) No protected interest. *Compare DeShaney v. Winnebago County Social Servs. Dep't*, 489 U.S. 189 (1989) (no due process violation where state fails to protect abused child from his parent, even where abuse detected by social service agency); *Collins v. City of Harker Heights*, 503 U.S. 115 (1992) (failure of city to warn employees about workplace hazards does not violate due process; due process clause does not impose a duty on the city to provide employees with a safe working environment).

2. Liberty interests

Life and freedom from physical restraint are the principal individual liberties that may not be abridged without due process. *Foucha v. Louisiana*, 504 U.S. 71 (1992).

H. What process is due?

Due process does not require that procedures be so comprehensive as to preclude any possibility of error. Rather, due process requires a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court formulated the test by which minimum procedural requirements are determined:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of the safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

1. Factors considered

As the "interest" prongs of the *Mathews* test suggest, the amount of process due hinges first on the private interest at stake.

"The first step in the balancing process mandated by *Eldridge* is identification of the nature and weight of the private interest affected by the official action challenged." *Mackey v. Montrym*, 443 U.S. 1, 11 (1979).

The "second stage of the *Eldridge* inquiry requires consideration of the likelihood of an erroneous deprivation of the private interest involved as a consequence of the procedures used." *Id*. at 13.

The third leg of the *Eldridge* balancing test requires courts to identify the governmental function involved; also, to weigh in the balance the state interests served by the summary procedures used, as well as the administrative and fiscal burdens, if any, that would result from the substitute procedures sought. *Id*. at 17.

2. Elements of due process

In addition to notice and opportunity to be heard, standard elements of due process include (1) notice of the basis of the governmental action; (2) a neutral arbiter; (3) an opportunity to make an oral presentation; (4) a means of presenting evidence; (5) an opportunity to cross-examine witnesses or to respond to written evidence; (6) the right to be represented by counsel; and (7) a decision based on the record with a statement of reasons for the result. *Rogin v. Bensalem Township*, 616 F.2d 680, 694 (3d Cir. 1980); *see also, e.g.*, *United States ex rel. Negron v. State of New York*, 434 F.2d 386 (2d Cir. 1970) (due process right to translation of proceedings for non-English speakers; to non-English speaker a proceeding conducted without an interpreter is merely a "babble of voices.").

3. Application

Civil commitment. In *Addington v. Texas*, 441 U.S. 418 (1979), the Court considered the standard of proof required in a civil proceeding to commit an individual involuntarily. The Court held that "civil commitment for any purpose" must be supported by clear and convincing evidence of individual dangerousness. *Id*. at 425.

Civil forfeiture. Procedural due process applies where the government seeks to seize property allegedly subject to forfeiture (which most often occurs when the government claims that the property was connected to, or was the product of, criminal activity). Absent exceptional circumstances, the government must provide the owner of real property notice and an opportunity for some type of hearing prior to seizing real property.

I. California procedural due process principles

California law is similar to federal. Under state law, "liberty" includes freedom from arbitrary adjudicative procedures. Whether there is a right to a hearing and the timing and elements of the hearing are established by balancing four factors.

> Private interest
> Risk of error
> Government interest
> Dignitary interest in providing notice and hearing to the individual
>
> [T]he extent to which due process relief will be available depends on a careful and clearly articulated balancing of the interests at stake in each

> context. In some instances this balancing may counsel formal hearing procedures that include the rights of confrontation and cross-examination, as well as a limited right to an attorney. (*See, e.g., Morrissey v. Brewer, supra,* 408 U.S. 471; *In re Bye* (1974) 12 Cal. 3d 96 [115 Cal. Rptr. 382, 524 P.2d 854].) In others, due process may require only that the administrative agency comply with the statutory limitations on its authority. (*See, e.g., Cafeteria Workers v. McElroy, supra*, 367 U.S. 886.) **More specifically, identification of the dictates of due process generally requires consideration of (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail**. (*See Civil Service Assn. v. City and County of San Francisco* (1978) 22 Cal. 3d 552, 561 [150 Cal. Rptr. 129, 586 P.2d 162].)

People v. Ramirez, 25 Cal 3d 260, 158 Cal. Rptr. 316 (1979).

Examples

The State Bar maintains a "client security fund" to compensate clients cheated by lawyers. Statute makes payments discretionary with the Bar and provides for no procedures. Held: Due process requires an informal hearing at which applicant can present information in support of his claim. It also requires written findings of fact.

> **The opportunity to be heard is 'a fundamental requirement of due process.'** (*Stanson v. San Diego Coast Regional Com*. (1980) 101 Cal. App. 3d 38, 45 [161 Cal. Rptr. 392]; *see Perry v. Sindermann, supra*, 408 U.S. at p. 603 [33 L. Ed. 2d at p. 580].) However, there is no precise manner of hearing which must be afforded; rather the particular interests at issue must be considered in determining what kind of hearing is appropriate. A formal hearing, with full rights of confrontation and cross-examination is not necessarily required. (*See People v. Ramirez, supra*, 25 Cal.3d at p. 275.) **What must be afforded is a 'reasonable' opportunity to be heard.** (*Anderson Nat. Bank v. Luckett*, 321 U.S. 233, 246 [88 L. Ed. 692, 704, 64 S. Ct. 599, 151 A.L.R. 824]; *Drummey v. State Bd. of Funeral Directors*, 13 Cal.2d 75, 80 [87 P.2d 848]; *CEEED v. California Coastal Zone Conservation Com*. [(1974) 43 Cal. App. 3d 306, 329 (118 Cal. Rptr. 315)].)

Saleeby v. State Bar, 39 Cal.3d 547, 216 Cal. Rptr 367 (1985).

Decisionmakers must be impartial. Normally this requires a showing of actual rather than merely apparent bias. For example, the Pro Tem hearing officer in a farm labor case was not biased even though his law firm handles such cases.

> The right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him. As stated in *Evans v. Superior Court* (1930) *supra*, 107 Cal.App. 372, 380, the word bias refers 'to the mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved.' In an administrative context, Professor Davis has written that 'Bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification.' (2 Davis, Administrative Law Treatise (1st ed. 1958) p. 131; also see *United States v. Morgan* (1941) 313 U.S. 409, 420-421 [85 L.Ed. 1429, 1434-1435, 61 S.Ct. 999]; *Trade Comm'n. v. Cement Institute* (1948) 333 U.S. 683, 700-703 [92 L.Ed. 1010, 1034-1036, 68 S.Ct. 793].) This long established, practical rule is merely a recognition of the fact that anyone acting in a judicial role will have attitudes and preconceptions toward some of the legal and social issues that may come before him.

Andrews v. Agricultural Labor Relations Bd., 28 Cal.3d 781 171 Cal.Rptr. 590 (1981)

Financial bias, even an appearance of bias, however, requires disqualification. *Haas v. County of San Bernardino*, 27 Cal.4th 1017, 119 Cal.Rptr. 341 (2002) (pro tem hearing officer hired from local law firm).

Lower-level staff members, however, may not be an adversary and then function as a decisionmaker or an *ex parte* adviser to a decisionmaker.

> The protections of procedural due process apply to administrative proceedings (*Richardson v. Perales* (1971) 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842); the question is simply what process is due in a given circumstance. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484; *see Logan v. Zimmerman Brush Co*. (1982) 455 U.S. 422, 428-429, 102 S. Ct. 1148, 1153-1154, 71 L. Ed. 2d 265.) Due process, however, always requires a relatively level playing field, the so-called 'constitutional floor' of a 'fair trial in a fair tribunal,' in other words, a fair hearing before a neutral or unbiased decision maker. (*Bracy v. Gramley* (1997) 520 U.S. 899, 904-905, 117 S. Ct. 1793, 1797, 138 L. Ed. 2d 97; *Withrow v. Larkin* (1975) 421 U.S. 35, 46, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712 (Withrow).)

…

> Just as in a judicial proceeding, due process in an administrative hearing also demands an appearance of fairness and the absence of even a probability of outside influence on the adjudication. In fact, the broad applicability of administrative hearings to the various rights and responsibilities of citizens and businesses, and the undeniable public interest in fair hearings in the administrative adjudication arena, militate in favor assuring that such hearings are fair. As one commentator recently noted, 'inescapably, administrative law and the administrative state impinge upon the public more and more often[.] When driver's licenses, house remodeling, vacations at the beach or the mountains, clean air and water, and cigarettes are all impacted by administrative regulations, the high likelihood is that . . . [the] administrative law judge . . . [is] going to be the person who is conducting that pivotal, first level of judicial review[.]' (Gillette, Administrative Law Judges, Judicial Independence, and Judicial Review: Qui Custodiet Ipsos Custodes, 20 J. Nat'l Ass'n Admin. L. Judges (2000) 95, 113, *as quoted by* Salkin, Judging Ethics for Administrative Law Judges: Adoption of a Uniform Code of Judicial Conduct for the Administrative Judiciary, 11 Widener J. Pub. L.7, 8, fn 3. (2002))

Nightlife Partners v. City of Beverly Hills, 108 Cal. App. 4th 81, 133 Cal.Rptr.2d 234 (2002).

II. SUBSTANTIVE DUE PROCESS

The term "substantive due process" describes liberty-based due process challenges which seek certain outcomes, rather than additional procedures. In such cases, the Supreme Court recognizes a non-textual "liberty" which then limits or voids laws limiting that liberty.

Courts have construed the due process clause and sometimes other clauses of the Constitution, as comprehending unenumerated rights that are "implicit in the concept of ordered liberty." However, what those rights are is not always clear.

Privacy is the quintessential unenurated right protected under substantive due process principles. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), wherein the Court held that criminal prohibition of contraceptive devices for married couples violated federal, judicially enforceable privacy rights. The right to contraceptives was found in what the Court called the "penumbras", or shadowy edges, of certain amendments that arguably refer to certain privacy rights.

> We have had many controversies over these penumbral rights of "privacy and repose." *See, e.g., Breard v. Alexandria*, 341 U.S. 622, 626, 644; *Public Utilities Comm'n v. Pollak*, 343 U.S. 451; *Monroe v. Pape*, 365 U.S. 167; *Lanza v. New York*, 370 U.S. 139; *Frank v. Maryland*, 359 U.S. 360; *Skinner v. Oklahoma*, 316 U.S. 535, 541. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

The penumbra-based rationale of *Griswold* has since fallen into disuse. The Supreme Court instead uses the due process clause alone as a source of privacy protections. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (substantive due process right to engage in private consensual homosexual conduct).

Substantive due process review proceeds nearly identically to equal protection review. However, by deciding a case on substantive due process grounds, courts prevent an "end-run" around equal protection holding:

> The reason why the Court in *Lawrence* did not employ an equal protection analysis was itself protective. The Court stated that it would not sufficiently establish the right to intimate homosexual relations if only equal protection were invoked, because a state might frustrate the right by denying heterosexuals as well as homosexuals the right to non-marital sexual relations.

Witt v. Dep't of the Air Force, 527 F.3d 806 (Canby, J., concurring in part and dissenting in part).

III. EQUAL PROTECTION

Where a law treats certain classes of people differently than others, a potential equal protection claim arises. The doctrine regulates ability of government to classify individuals for purpose of receiving benefits or punishment. It requires that classifications relate to proper governmental purpose and that similarly situated persons be similarly treated.

A. 14th Amendment.

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.**

B. 5th Amendment equal protection guarantee

The Fifth Amendment has no Equal Protection Clause. An equal protection claim under the Fifth Amendment is brought under the equal protection component of the Due Process Clause. "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).

C. Levels of scrutiny

1. Rational basis scrutiny.

The equal protection standard that is applied to the majority of instances is known as the rational basis test. It requires only that a statute that treats similarly situated individuals differently be rationally related to a "legitimate" governmental interest. *Romer v. Evans*, 517 U.S. 620, 631 (1996):

> The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 271-272, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979); *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 64 L. Ed. 989, 40 S. Ct. 560 (1920). 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. *See, e. g., Heller v. Doe*, 509 U.S. 312, 319-320, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993).
> …
>
> [E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority. In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. *See New Orleans v. Dukes*, 427 U.S. 297,

> 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976) (tourism benefits justified classification favoring pushcart vendors of certain longevity); *Williamson v. Lee Optical of Okla., Inc*., 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955) (assumed health concerns justified law favoring optometrists over opticians); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 93 L. Ed. 533, 69 S. Ct. 463 (1949) (potential traffic hazards justified exemption of vehicles advertising the owner's products from general advertising ban); *Kotch v. Board of River Port Pilot Comm'rs for Port of New Orleans*, 330 U.S. 552, 91 L. Ed. 1093, 67 S. Ct. 910 (1947) (licensing scheme that disfavored persons unrelated to current river boat pilots justified by possible efficiency and safety benefits of a closely knit pilotage system). The laws challenged in the cases just cited were narrow enough in scope and grounded in a sufficient factual context for us to ascertain some relation between the classification and the purpose it served. By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Romer v. Evans, 517 U.S. 620, 631-633 (1996).

The rational basis test is premised on the assumption that misguided laws will eventually be changed through the political process. *See, e.g., Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000); *Boivin v. Black*, 225 F.3d 36, 42 (1st Cir. 2000); *Zehner v. Trigg*, 133 F.3d 459, 463 (7th Cir. 1997). Under the rational basis test, the Court usually defers to the legislature.

Nevertheless, the Court has insisted that the rational basis test is not "toothless," *Matthews v. Lucas*, 427 U.S. 495, 510 (1976), and that it provides meaningful protection from the erratic and disparate treatment that are the hallmarks of invidious discrimination. The mere explication of a justification in the face of contrary evidence does not satisfy the rational-basis test.

> To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *See Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973). Furthermore, some objectives -- such as 'a bare . . . desire to

> harm a politically unpopular group,' id., at 534 -- are not legitimate state interests. See also *Zobel*, *supra*, at 63.

City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446-447, 105 S.Ct. 3249 (1985).

In *Garberding v. INS,* 30 F.3d 1187, 1190-91 (9th Cir. 1994), the Ninth Circuit concluded that it was irrational to deport an immigrant because she did not qualify under state law for expungement of a conviction, even though she met all criteria for expungement under the Federal First Offender Act. 30 F.3d at 1191 ("distinguishing [plaintiff] for deportation because of the breadth of Montana's expungement statute, not because of what she did, has no logical relation to the fair administration of the immigration laws"). *See also Tapia-Acuna v. INS*, 640 F.2d 223, 224-25 (9th Cir. 1981) ("Like the Second Circuit, this court applies the rational basis test to federal immigration statutes distinguishing among groups of aliens."); *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993) (same).

The rational basis test requires only a rational relationship between the end (the legitimate governmental objective) and the means to that end (the statute whose constitutionality is at issue).

2. Intermediate Scrutiny.

The third equal protection test provides for an intermediate level of review falling between the rigorous strict scrutiny test and the lenient rational basis test. To pass muster under this intermediate test, a classification must bear a "substantial relationship" to an "important" governmental interest *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Application of this test is confined to a discrete number of classifications, generally those based on gender and illegitimacy. *Id*.

> In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amdt. 14, § 1, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973); *cf. Lyng v. Automobile Workers*, 485 U.S. 360, 370, 99 L. Ed. 2d 380, 108 S. Ct. 1184 (1988). Classifications based on race or national origin*, e. g., Loving v. Virginia*, 388 U.S. 1, 11, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967), and classifications affecting fundamental rights, *e. g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 672, 16 L. Ed. 2d 169, 86 S. Ct. 1079 (1966), are given the most exacting 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. *See, e. g., Mississippi*

> *University for Women v. Hogan*, 458 U.S. 718, 723-724, 73 L. Ed. 2d 1090, 102 S. Ct. 3331, and n. 9 (1982); *Mills v. Habluetzel*, 456 U.S. 91, 99, 71 L. Ed. 2d 770, 102 S. Ct. 1549 (1982); *Craig v. Boren*, 429 U.S. 190, 197, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976); *Mathews v. Lucas*, 427 U.S. 495, 505-506, 49 L. Ed. 2d 651, 96 S. Ct. 2755 (1976).
>
> To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective. Consequently we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because 'visiting this condemnation on the head of an infant is illogical and unjust.' *Weber v. Aetna Casualty & Surety Co*., 406 U.S. 164, 175, 31 L. Ed. 2d 768, 92 S. Ct. 1400 (1972). Yet, in the seminal case concerning the child's right to support, this Court acknowledged that it might be appropriate to treat illegitimate children differently in the support context because of 'lurking problems with respect to proof of paternity.' *Gomez v. Perez*, 409 U.S. 535, 538, 35 L. Ed. 2d 56, 93 S. Ct. 872 (1973).

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

In *Plyler v. Doe,* 457 U.S. 202 (1982), the Supreme Court held that middle level scrutiny should be applied when a law discriminates against undocumented children by depriving them of an important interest, namely education. 457 U.S. *at* 221.

> [Every] citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. As one early commentator noted, given the historical emphasis on geographic territoriality, bounded only, if at all, by principles of sovereignty and allegiance, no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.

Plyler v. Doe, 457 U.S. 202, 211 n.10 (1982).

> [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. Our cases applying the Equal Protection Clause reflect the same territorial theme:

> Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities, -- each responsible for its own laws establishing the rights and duties of persons within its borders.
>
> There is simply no support for appellants' suggestion that 'due process' is somehow of greater stature than 'equal protection' and therefore available to a larger class of persons. To the contrary, each aspect of the Fourteenth Amendment reflects an elementary limitation on state power. To permit a State to employ the phrase 'within its jurisdiction' in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment. The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection.

Id. at 212-213.

> The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.' *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). But so too, '[the] Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.' *Tigner v. Texas*, 310 U.S. 141, 147 (1940). The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

> But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.' With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.

Id. at 217-218.

> These well-settled principles allow us to determine the proper level of deference to be afforded § 21.031. Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.' Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population. *See San Antonio Independent School Dist. v. Rodriguez*, supra, at 28-39. But more is involved in these cases than the abstract question whether § 21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.

Id. at 224-225.

Though not a fundamental right, it the Court found education sufficiently important to merit intermediate review. *Id*. at 221-224. Requirements are satisfied where no better available alternative exists.

3. 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). Courts apply this test to statutes that place differing restrictions on persons based on a "suspect" criterion, such as race, as well as to those that burden the exercise of what are considered "fundamental rights." *Vacco v. Quill*, 521 U.S. 793, 799 (1997).

A "suspect" criterion is one that is so infrequently related to the realization of a legitimate governmental objective that its invocation as a reason for differential treatment is usually the mark of enmity and prejudice. *City of Cleburne v. Cleburne Living Ctr*., *supra*, 473 U.S. at 440. Race and national origin are classic examples of suspect criteria. *Id. See also Plyler v. Doe*, 457 U.S. 202, 218 n. 14 (1982) (strict scrutiny test applies to the differential treatment of groups that "have historically been `relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process'") (*quoting San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

Strict scrutiny is also applied to classifications that impinge on a fundamental right. The Supreme Court has recognized that the right to have access to the courts is a fundamental right. *Bounds v. Smith*, 430 U.S. 817, 828 (1977) ("[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.")

a. Fundamental Rights:

Where fundamental rights infringed, strict scrutiny is the test and the challenged law is generally struck down, *e.g*.,

1) Right to Interstate Travel - *Shapiro v. Thompson*, 394 U.S. 618 (1969). Key because applied to the right to receive emergency health care.

> The right of interstate travel has repeatedly been recognized as a basic constitutional freedom. Whatever its ultimate scope, however, the right to travel was involved in only a limited sense in *Shapiro*. The Court was there concerned only with the right to migrate, "with intent to settle and

> abide" or, as the Court put it, "to migrate, resettle, find a new job, and start a new life." Id., at 629. Even a bona fide residence requirement would burden the right to travel, if travel meant merely movement. But, in Shapiro, the Court explained that "the residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites" for assistance and only the latter was held to be unconstitutional.
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>
> Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much "a basic necessity of life" to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements. It would be odd, indeed, to find that the State of Arizona was required to afford Evaro welfare assistance to keep him from the discomfort of inadequate housing or the pangs of hunger but could deny him the medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness.

Memorial Hospital v. Maricopa County, 415 U.S. 250, 254-55 (U.S. 1974)

2) Right To Vote –

> A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature. As stated by the Court in *United States v. Bathgate*, 246 U.S. 220, 227 "[t]he right to vote is personal . . . ." While the result of a court decision in a state legislative apportionment controversy may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining whether there has been any

> discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote. Like *Skinner v. Oklahoma*, 316 U.S. 535, such a case 'touches a sensitive and important area of human rights,' and 'involves one of the basic civil rights of man,' presenting questions of alleged 'invidious discriminations . . . against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.' 316 U.S., at 536, 541. Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in *Yick Wo v. Hopkins*, 118 U.S. 356, the Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights.' 118 U.S., at 370.

Reynolds v. Sims, 377 U.S. 533, 561–62 (1964)

D. Equal Protection in California

1. Rational Basis

> [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.

2. Strict Scrutiny

> [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.

3. No Intermediate Scrutiny – Strict Scrutiny Applied.

> As we noted in *Hernandez, supra*, 41 Cal.4th 279, 299, footnote 12: "In applying the federal equal protection clause, the United States Supreme Court has applied a third standard—'intermediate scrutiny'—'to discriminatory classifications based on sex or illegitimacy.' (Clark v. Jeter (1988) 486 U.S. 456, 461 [100 L. Ed. 2d 465, 108 S. Ct. 1910].)" 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.

E. Equal protection and government benefits

1. Welfare Benefits

Saenz v. Roe, 526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999), 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. "[T]he 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."

2. Social Security

With the exception of gender distinctions and different treatment of children born outside of marriage, nearly all categories that lead to different benefit treatment have also been upheld against attack under the equal protection component of the Fifth Amendment's Due Process Clause.

In *Mathews v. Lucas*, 427 U.S. 495 (1976), the Supreme Court upheld the Act's provisions dealing with proof of dependency by children born outside marriage. The

decision concludes that requiring proof of financial dependency of such children does not deny equal protection.

In *Jimenez v. Weinberger*, 417 U.S. 628 (1974), the Supreme Court struck down provisions of the Act which denied benefits to children born outside marriage whose dependency on a disabled worker did not arise until after the onset of disability. It found the differential treatment of non-marital children to be a denial of equal protection:

> 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.

Id. at 637.

3. Food Stamps

Rational Basis and Food Stamps: Discrimination against households containing unrelated purposes in granting Food Stamps has been held irrational:

> Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. See *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972); *Richardson v. Belcher*, 404 U.S. 78, 81 (1971); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). The purposes of the Food Stamp Act were expressly set forth in the congressional "declaration of policy":
>
> "It is hereby declared to be the policy of Congress . . . to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households. The Congress hereby finds that

> the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. The Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of our agricultural abundances and will strengthen our agricultural economy, as well as result in more orderly marketing and distribution of food. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to purchase a nutritionally adequate diet through normal channels of trade." 7 U. S. C. § 2011.
>
> The challenged statutory classification (households of related persons versus households containing one or more unrelated persons) is clearly irrelevant to the stated purposes of the Act. As the District Court recognized, the relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do with their abilities to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements.
>
> … The legislative history that does exist, however, indicates that that amendment was intended to prevent so-called "hippies" and "hippie communes" from participating in the food stamp program. See H. R. Conf. Rep. No. 91-1793, p. 8; 116 Cong. Rec. 44439 (1970) (Sen. Holland). The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. As a result, "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment." …
>
> 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).

F. 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, ...

The statute can be used to protect those whose rights are deprived. Section 1983 of the Civil Rights Act allows individuals to sue to redress violations of federally protected rights, like the First Amendment rights and the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Section 1983 is used to enforce rights based on the federal constitution and federal statutes.