**Equal Protection Under the Law**

Equal protection is the guarantee that no person or class of people can be deprived of the same protections of the laws that other people have. Combined, the 5th and 14th Amendments create this protection.

**Discrimination and Its Constitutional Limits**

Discrimination is the practice of classifying or treating groups of people differently. While some discrimination is inevitable and even necessary, such as age restrictions for driving or drinking, the Constitution prohibits discrimination that is unreasonable. Constitutional prohibitions can be found in the 5th and 14th Amendments.

The 5th Amendment’s Due Process Clause prohibits the federal government from unreasonable discrimination, stating:

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

The 14th Amendment extends the 5th Amendment’s prohibition to the state governments with its Equal Protection Clause:

* [N]or 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.

The 14th Amendment was ratified in 1868 as a direct result of the reconstruction efforts following the Civil War. In 1866 Congress passed a series of bills promising citizenship, medical care, and education to freed slaves and war refugees. When Andrew Johnson became President following the assassination of President Lincoln, he vetoed the legislation, thereby infuriating the Republican-controlled Congress. Congress overrode President Johnson’s veto and went on to draft the 14th Amendment, to remove the ability of the state governments from again threatening the citizenship and basic rights of the newly freed slaves.

It is important to note that there is no Equal Protection Clause in the 5th Amendment:

* The Equal Protection Clause of the 14th Amendment has no counterpart in the Constitution applicable to the federal government; it is limited to state action. Nevertheless, it is clear that grossly unreasonable discrimination by the federal government violates the Due Process Clause of the 5th Amendment (Bolling v. Sharpe, 347 U.S. 497, 1954). Thus, there are really two equal protection guarantees. The court applies the same standards under either constitutional provision. (Quoted from barbri Bar Review, Harcourt Professional Educational Group, 2001.)

**The Meaning of Due Process**

“Due process” refers to the constitutional guarantee that the federal government (5th Amendment) and state governments (14th Amendment) cannot deny any individual life, liberty, or property without the use of fair procedures and fair laws. When discussing due process, there are two considerations to be made: (1) Is the procedure fair that is used to take the life, liberty, or property; (2) is the law itself fair that allows the government to take the life, liberty, or property?

In order to ensure that the procedure is fair (known as procedural due process), the government must honor the Bill of Rights; provide reasonable notice to the person whose life, liberty, or property is in question; and provide the individual a right to be heard. Procedural due process is violated with illegal searches or unfair court proceedings.

The second consideration comes because it is not enough that the procedures the government follows are fair. The laws that allow the government to take life, liberty, or property also must be fair. This concept is known as substantive due process. Substantive due process violations occur when such things as blanket bans on firearms, apparel, or procedures (such as abortions) are enacted. In short, the difference between procedural and substantive due process can be illustrated as follows: A law prohibits possession of narcotics (substantive), and the police generally must obtain a warrant before conducting a search for narcotics in one’s home (procedural).

**Discrimination by the Government: How the Courts Decide**

If a person sues the government claiming that he or she has been the subject of unreasonable discrimination, the court must first determine whether there was actually discrimination. To do so, the court looks at whether the group (or class) to which the plaintiff(s) belongs (i.e., race, gender, sexual orientation, or age) was treated differently. If the court finds there was discrimination, this is not necessarily a bad thing. For example, a 10-year-old may sue in state court, complaining that the state has refused to issue a driver’s license on the basis of age. According to the definition, this is age discrimination. However, it is unlikely that the court would find this discrimination to be unreasonable. Deciding that is the second step in the process.

Once discrimination has been established, the court must identify the test that will be used to determine whether the discrimination was unreasonable. Over time, the Supreme Court has established four tests to determine the constitutionality of government discrimination. A court will apply one of the following tests, based on the classification and/or the right allegedly violated.

1. **Strict scrutiny**: Discrimination based on race or national origin is almost never allowed

A court will apply strict scrutiny—i.e., look very closely—if a class is deemed to be suspect. A class of people is considered suspect if it has historically suffered unequal treatment on the basis of race or national origin. Once a suspect class has been established, the court will apply strict scrutiny when determining whether the discrimination was reasonable. The government, in the rare exception when the defendant bears the burden of proof, must show that the there was a compelling purpose for the discrimination. This type of case typically has been seen in the area of affirmative action (see *UC Regents v. Bakke*, 1978*; Richmond v. Croson*, 1989; and *Adarand v. Pena*, 1995). It is almost impossible for the government to show a purpose that is compelling enough to overcome the presumption of invalidity.

2. **Heightened, or intermediate scrutiny**: Discrimination based on gender is only sometimes allowed

If the classification or treatment is not based on race, then the courts will ask whether it was based on gender. Gender is considered a quasi-suspect class by the courts. In a case involving a quasi-suspect class, the court will apply heightened scrutiny when determining whether the discrimination was reasonable. In order for the plaintiff(s) to prove the discrimination is unreasonable, he or she must show that the classification or treatment lacks an exceedingly persuasive justification for an important government objective. If the court finds that there are, in fact, important government objectives at stake, the plaintiff must then show that the classification or treatment is not substantially related to the achievement of these important objectives. This means the plaintiff must show one of two things: 1) There is no goal or interest advanced by the classification (usually not the case since the governmental objective may be as simple as safety, as in the age requirement for a driver’s license); or 2) assuming there is an important purpose served by the classification, such as safety, the classification does not help the government achieve its stated goal. For example, a law in the name of safety may require all persons to be at least 5'0" in height before being able to drive, but the courts would likely find that such a restriction fails to promote safe driving if studies showed that people shorter than 5'0" do not pose a greater risk behind the wheel than people over 5'0".

Heightened scrutiny is very subjective because it essentially allows the judge(s) to use individual definitions of reasonableness in determining whether a classification is unconstitutional. The burden still lies with the person challenging the classification. This level of scrutiny is not as intense as strict scrutiny, due to the recognition of certain biological differences between the sexes. For example, a six-week maternity leave for women but no comparable paternity leave for men has been upheld, and the courts have approved the male-only military draft. However, classifications cannot be based on archaic notions of women being the “fairer sex,” and the government cannot use social or cultural concepts of a proper “woman’s place” to deny women equality of opportunity. The Supreme Court used the concept of “archaic notions” to decide the 1979 case of *Orr v. Orr*, in which it ruled that a state law authorizing alimony payments only for wives was a violation of the Equal Protection Clause of the 14th Amendment. However, the court has recognized the existence of “inherent differences” between the sexes, including height and weight tendencies, different responses to criminal defendants (*J.E.B. v. Alabama*, 1994), and the heavier burden of childbirth and child-rearing on women (Michael v. Superior Court of Sonoma County, 1981). The Supreme Court limited the use of these recognized differences in 1996 in the VMI case when it ruled that:

• Inherent differences between men and women should be recognized and at times celebrated, but they may not be used to place artificial constraints on an individual’s opportunity or perpetuate the legal, societal, and economic inferiority of women.

3. **Fundamental rights**: Discrimination that denies basic constitutional rights is almost never allowed

The courts have created a niche for plaintiffs who allege that their fundamental rights have been impaired. The courts apply strict scrutiny if a right is at issue that is explicitly mentioned in the Constitution (e.g., First Amendment liberties and voting) or is implicit in the Constitution (e.g., travel, political association, or privacy). Although this is the same test used for race-based classifications, the court only looks at the right or liberty allegedly being violated, rather than the class of people involved. For example, in 1978 the First Amendment’s right to association and speech guaranteed the right of the Nazi Party to participate in a town parade in Skokie, Illinois, despite the fact that a large majority of the town’s population was Jewish.

4. **Rational basis**: Discrimination is allowed in some cases

In all other cases where there is an allegation of discrimination, the courts apply a rational basis test. The courts will allow the discrimination if it has a reasonable relationship to a proper purpose of the government. The plaintiff in this case must show that there is no reasonable relationship between the law and the government objective, or that the government objective is outside of its constitutional authority. For example, the courts used the rational basis test to uphold laws banning polygamy, laws establishing a minimum marital age, and a law prohibiting felons from obtaining a teaching credential.

**Discrimination by a Private Entity**

The U.S. Constitution, including the 5th and 14th Amendments, only protect the individual against government action. In order for the protections of the 5th and 14th Amendments to apply, the federal or state governments (or their agents) must have engaged in discriminatory actions or practices. While there are state and federal laws in place that prevent a private party from discriminating against a person based on gender, race, age, sexual orientation, etc., such private discrimination is not barred by the 5th and 14th Amendments. If an individual suffers discrimination by an entity other than the government, he or she can look to three areas in the Constitution for relief:

• The Commerce Clause of Article I, which gives Congress the authority to “regulate commerce with foreign nations, and among the several states.” This has come to be interpreted to allow congress to dictate employment guidelines for all businesses whose goods directly or indirectly affect interstate commerce.

• The power of Congress to attach “strings” to federal grants and contracts that eliminate private discrimination under the spending and taxing power of Article I

• The judiciary’s tendency to broadly interpret the 13th Amendment in order to eliminate the last remnants of slavery

Generally, however, an individual will look to federal or state laws that govern discrimination in the private sector, such as the federal Civil Rights Act of 1866, federal Civil Rights Act of 1964, federal Civil Rights Act of 1968, federal Age Discrimination in Employment Act of 1967, federal Americans with Disabilities Act of 1990, or state employment laws. Therefore, if a person is claiming discrimination by a private entity—an employer, business, or organization— he or she will sue under state and federal statutes designed to protect the individual. He or she may not claim protection under the Constitution and will not have the tests described above applied to their case. For example, if a disabled person is suing a private company, such as a restaurant, for lacking access to its facilities, he or she will use the Americans with Disabilities Act of 1990 as the basis for the claim, rather than the 5th and/or 14th Amendments.

**Example of a Discrimination Case: Women and Police and Fire Departments**

The police and fire departments of Buffalo, New York, were sued in a series of cases that eventually were consolidated in the case of *U.S. v. City of Buffalo*

(1978). Among the 5th and 14th Amendment claims of discrimination based on race, color, and national origin were claims based on the absolute prohibition of women as either police officers or firefighters. The court of appeals ruled that any time there is shown to be a disproportionate impact on a protected class (a class based on national origin, color, race, religion, or gender), the defendants must show that the methodology that appears discriminatory is “significantly correlated with important elements of work behavior which compromise or are relevant to the job(s).” The defendants offered no conclusive evidence that the exclusion of women bore any relationship to the performance of the position’s duties. When the defendants argued that the minimum height, weight, and physical strength requirements may exclude women, the court ruled that such prerequisites cannot be used because the assumption of strength and each requirement must in itself bear a direct correlation to the performance of a specific task. In other words, the actual, specific duties of a police officer or firefighter must require the height, weight, or degree of physical strength demanded by the qualifying tests. For example, a fire department would have to show that a person had to be 5’10” tall, weigh 180 pounds, and bench-press 250 pounds in order to drive a fire truck, handle a hose, or raise a ladder.