

# 11 | Constitutional Limitations

## DUE PROCESS OF LAW

### Learning Objectives

- Differentiate substantive from procedural due process.
- Provide examples of “fundamental rights” and explain why determining whether or not a right is “fundamental” is critical to any substantive due process analysis.
- Understand how the state action doctrine limits who can be held responsible for due process violations.

### Introduction

Laws provide authority for public health action, but also set limits. The drafters of the US Constitution drew lessons from centuries of philosophy and governance to limit the authority of the federal government, aiming to prevent the abuses of colonial rule. Even with a government of limited powers, several states would not ratify the Constitution unless it expressly guaranteed basic civil liberties like freedom of speech, press, and assembly and freedom from unreasonable searches and seizures. The first 10 amendments to the Constitution, called the Bill of Rights, were drafted to guarantee these liberties; among these is *due process of law*. This chapter covers the right of due process as a limit on public health action.

The Constitution’s Fifth Amendment provides that “No person shall . . . be deprived of life, liberty, or property, without due process of law.” The Fifth Amendment, like all of the Bill of Rights, was originally interpreted by the Supreme Court as limiting only federal government actions. After the Civil War, the ratification of the 14th Amendment, which has its own Due Process Clause, expanded the guarantee to citizens harmed by state actions (*Twining v. New Jersey*, 1908). When individuals

believe their due process rights are being abridged, they can challenge the government's actions in court. Because courts are left to decide whether these actions are appropriate to the circumstances, due process relies on standards that are not expressly written in the Constitution.

Due process embodies two core limitations on government action: the government must respect fundamental rights, and it cannot deprive people of “life, liberty, or property” without sufficient procedural protections. *Substantive due process* is a doctrine of fundamental rights. It provides that the government cannot violate certain rights unless it has a “compelling state interest.” The Supreme Court has used substantive due process as a means of protecting rights that it considers vital elements of liberty in a free society, even though not all of these rights are actually spelled out in the Constitution. *Procedural due process*, by contrast, looks at how the law is applied. It requires basic safeguards of fairness, such as advance notice and an appropriate hearing, before a governmental action against a person's interest is carried out. These safeguards help balance the power of the individual against that of government and are thought to promote better, more accurate results.

This chapter starts by outlining the basic doctrines of procedural and substantive due process, including the legal tests that courts apply to decide whether due process rights have been violated. After reviewing the Supreme Court's struggle to define the scope of reproductive rights, we examine two cases where public health was raised as a justification for governmental action: one about involuntary sterilization and one about Ebola. The chapter concludes with a brief discussion of the *state action doctrine*.

## Procedural Due Process

Where an individual's life, liberty, or property may be affected by a government's actions, procedural due process requires that it provide those individuals advance notice and a hearing conducted by an impartial decision-maker, as well as the right to appeal the decision in a court of law (*Zinerman v. Burch*, 1990). The requirements of procedural due process are flexible, taking into consideration that a fair and efficient legal system has to balance process with speed and affordability. Courts typically weigh four factors: the significance of the individual interest affected by the action (paying a small fine counts far less than going to jail, for instance), the risk that a plaintiff will “suffer an erroneous deprivation” of his or her rights

through the procedure the government is using, the potential benefits of imposing additional procedural safeguards, and the government's interest in its procedural approach (*Mathews v. Eldridge*, 1976).

Public health laws that impose penalties, restrict movement, confiscate property, or otherwise interfere with personal liberties must be implemented in a way that meets procedural due process standards. Before taking a routine public health action like the suspension of a restaurant permit, the government must provide a written notice that sets out the reasons for the proposed action and notifies the restaurant or other affected party of a date and time for a hearing before the action is taken. Individuals cannot lose certain government benefits, or "entitlements," such as Medicaid without a hearing, though that rule may be modified by current federal regulatory proposals. The government must also offer a route to appeal the decision from a hearing, though it can generally carry out its plans while the appeal proceeds.

These procedural requirements may be more flexible when public health dangers call for immediate action. For example, in 1979, the Supreme Court upheld a Massachusetts law that immediately suspended the driver's license of anyone who declined a breath-analysis test when arrested for a DUI. Although the Court assumed that drivers' licenses are "property," to which due process protections apply, it rejected the argument a pre-suspension hearing was required. Applying the four-factor test from *Mathews v. Eldridge*, the Supreme Court concluded that Massachusetts had a strong justification for "promptly removing such drivers from the road" and that "a presuspension hearing would substantially undermine the state interest in public safety." The dissenting justices, however, argued that because licenses were suspended for "noncooperation with the policy, not drunken driving," failure to provide a presuspension hearing violated "the most elemental principles of due process" (*Mackey v. Montrym*, 1979). Despite traditional procedural due process requirements, the public health interest in motor vehicle safety prevailed.

## Substantive Due Process

Unlike procedural due process, which deals with legal procedures like hearings and appeals, *substantive due process* relates to claims that a "fundamental right" has been infringed. What counts as a "fundamental right" has changed over time, but well-established fundamental rights include (and are not limited to) the right to marry, the right to vote, the right to

custody of one's children, the right to procreate, and the right to travel within the United States. Like all constitutional rights, these rights are not absolute; for example, parents can be deprived of custody in child abuse cases, and the right to marry does not extend to marrying a close relative. Since these rights are labeled as "fundamental," any law or policy limiting their exercise must clear a high bar.

Application of substantive due process involves determining whether or not the right at issue is fundamental, and then applying the corresponding "standard of review" (*U.S. v. Carolene Products Co.*, 1938). If a right claimed is deemed fundamental, the court will apply *strict scrutiny*, requiring the government to show that the law is necessary to advance a compelling state interest and is *narrowly tailored*, or precisely written, to infringe as little on individual rights as possible. If the right claimed is not fundamental, the court will apply a *rational basis test* that is far more deferential to the government's decision. Rational basis review requires that the government articulate a purpose that is legitimate and rationally related to its action, a far lower bar than strict scrutiny. The level of judicial scrutiny or review will often determine whether or not government actions are upheld; policies and laws generally survive under rational basis review but rarely under strict scrutiny.

The Supreme Court has struggled over the years to create a framework that can consistently define fundamental rights, and it has sometimes missed the mark badly. Most egregiously, the Fifth Amendment's Due Process Clause was cited in the pre-Civil War *Dred Scott* decision as a basis for upholding a "right" to own slaves (*Dred Scott v. Sandford*, 1857). Fifty years later, the 14th Amendment's Due Process Clause was used to invalidate a New York law setting the maximum number of hours bakers could work in a day, with the Supreme Court holding that the liberty of employers to freely contract with workers was a vital protected right (*Lochner v. New York*, 1905). The *Lochner* decision, which was later reversed, is now seen as a dangerous misstep that threatened to allow courts to "substitute their social and economic beliefs for the judgment of legislative bodies" (*Ferguson v. Skrupa*, 1963).

While it is useful for Supreme Court justices to have a doctrinal source for protecting the important rights that are not explicitly set out in the Constitution, it is also important to set limits on such an obviously expandable list by courts at their discretion, as we will see later. Accordingly, in recent decades, the Supreme Court has been very reluctant to recognize other rights or rights of certain groups as fundamental.

## Reproductive Freedom: The Evolving Jurisprudence of a Fundamental Right

In the 1960s and 1970s, justices found in substantive due process a basis for rights of privacy in reproductive matters. The reproductive rights series of cases show the Supreme Court's gradual recognition of a new fundamental right and demonstrates how it can expand or contract the scope of previously recognized rights. It began in 1965 with a decision striking down Connecticut's prohibition of prescribing, selling, and using contraceptives and naming a "right to privacy" for reproductive health decisions among married couples (*Griswold v. Connecticut*, 1965). This right was extended seven years later to all adults, regardless of marital status (*Eisenstadt v. Baird*, 1972).

Building on these precedents, in 1970, a pregnant, single woman sued the state of Texas, which criminalized abortions unless necessary to save the mother's life. In her case, *Roe v. Wade* (1973), the Supreme Court decided that "the 14th Amendment's concept of personal liberty and restrictions upon state action" allows women the fundamental right to decide whether to terminate a pregnancy. The Supreme Court in *Roe* maintained that although the right to terminate a pregnancy was fundamental, it was not absolute. Recognizing the state's legitimate interests in both the health of the mother and in protecting "prenatal life," it set graduated rules for the government's regulation of abortion by trimester of pregnancy: minimal regulation as for other medical procedures during the first trimester; increased regulation as reasonably related to maternal health during the second trimester; and as much regulation, or prohibition, during the third trimester, except when necessary to preserve maternal health.

Later, however, the Supreme Court reduced the scope of protection for a woman's right to obtain an abortion. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), it permitted restrictions on abortion—even in the first trimester—as long as they did not place an "undue burden" on access to an abortion. Under this ambiguous standard, states have been allowed to impose a wide variety of requirements on abortion procedures and providers, such as banning government employees or facilities from using public resources for performing abortions and requiring physicians to conduct an ultrasound procedure before an abortion. Other laws have been struck down as violating this standard. Most recently, the Supreme Court invalidated a Texas law mandating that abortion providers have admitting privileges at a nearby hospital and that abortion

clinics meet medical standards for “ambulatory surgery centers” (*Whole Women’s Health v. Hellerstedt*, 2016). In the majority opinion, Justice Breyer concluded that these measures significantly limited access to abortion services and did not—as Texas had claimed—further the state’s interest in protecting women’s health.

The scope of the right to reproductive privacy, including the right to obtain an abortion, remains contentious. Though it was recognized as a fundamental right more than 40 years ago, the exact contours of that right remain in flux. As advocates on both sides press the Supreme Court to move in their direction, public health evidence may become increasingly important. As seen in *Whole Women’s Health*, public health research is critical to the legal analysis of whether a restriction on abortion is actually necessary to promote women’s health and whether or not it constitutes an “undue burden.”

## Due Process in Action: Involuntary Sterilization

One of the most troubling due process cases in Supreme Court history, in which public health served as the purported justification for involuntary sterilization, concerns the concept of liberty. In the 1920s and 1930s, many Americans—including many influential figures and even scientists—subscribed to the bogus theory of “eugenics,” a belief that societies could improve public health and welfare through the systematic prevention of reproduction of genetically-inferior humans. This notion, carried to its extreme by the Nazis in the 1930s and 1940s, depended upon racist ideas about the inferiority of people of African, Slavic, Jewish, Southern European, and Asian descent. Many believers took poverty as a proxy for, and result of, of genetic inferiority. By the end of the 1920s, Virginia and some 30 other states had laws allowing the eugenic sterilization of the mentally impaired, laws that resulted in an estimated 65,000 involuntary sterilizations. One of the victims was Carrie Buck, who was held with her infant daughter and her mother at an institution called the Virginia State Colony for Epileptics and Feeble-minded. The stigma of unwed motherhood landed Carrie in the institution, but after a superficial examination determined that her eight-month-old daughter was “feeble-minded,” the head of the Colony ordered Carrie to be sterilized. In the famous case of *Buck v. Bell* (1927), Carrie sued the state of Virginia to prevent the forced procedure.

Despite the horrifying facts of the case and the lack of remotely credible medical standards used to deem a patient fit for sterilization, the Supreme Court saw only good (eugenic) public health practice.

It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes [citing *Jacobson v. Massachusetts*]. Three generations of imbeciles are enough (*Buck v. Bell*, 1927).

Only one justice dissented from the opinion, showing the powerful influence of prevailing popular beliefs on judges' views of due process rights. Additionally, the case also reminds us that simply providing adequate procedures does not guarantee fair outcomes. The Supreme Court's decision relies heavily on the fact that Carrie Buck and her guardian were offered the right to a hearing before an impartial decision-maker, timely information about the decision and hearing, and the opportunity to appeal the decision to the Circuit Court of Amherst County and Supreme Court of Appeals in Virginia. Though *Buck v. Bell* has never been overturned, it is clear that the Supreme Court would recognize the right to procreate as a fundamental right today.

## Due Process in Action: Ebola

Due process arises in dramatic form to this day in the control of communicable disease, albeit in rare and extreme circumstances. Faced with frightening diseases like Ebola and highly drug-resistant tuberculosis, health authorities on occasion resort to *quarantine* (confinement of a person exposed to a disease) and *isolation* (confinement of a person with a disease). These personal control measures implicate the fundamental right to liberty, which is specifically mentioned in both the Fifth and 14th Amendments, and therefore triggers strict scrutiny. They also raise issues of procedural due process; quarantine or isolation can only be imposed through fair procedures that allow the confined individual a chance to show that the government's assessment of their personal risk is wrong. Procedural due process may also require further safeguards like access to counsel and the opportunity to present and review evidence as at a

trial, although these issues have not been fully litigated in recent decades (*Greene v. Edwards*, 1980).

At the height of the 2014–2016 Ebola epidemic in West Africa, nurse Kaci Hickox flew from serving in the outbreak response in Sierra Leone to Newark Liberty International Airport, where she was screened for symptoms of Ebola. New Jersey airport officials, implementing an executive order signed by Governor Chris Christie to conduct active screening and impose quarantine when appropriate, quarantined her for 80 hours based on the health department’s assessment of her exposure to Ebola patients and an initial elevated temperature reading. Hickox, who contended she had never seen patients and was not at risk of infection, later challenged the grounds for her quarantine for failing to provide a hearing upon her confinement and failing to provide adequate notice of her rights.

The federal district court was sympathetic to Hickox’s arguments that the state overreacted and also sympathetic to the dilemma the state faced. It wrote: “Bad science and irrational fear often amplify the public’s reaction to reports of infectious disease. Ebola, although it has inspired great fear, is a virus, not a malevolent magic spell. The State is entitled to some latitude, however, in its prophylactic efforts to contain what is, at present, an incurable and often fatal disease” (*Hickox v. Christie*, 2016). The court found that procedural due process did not require a predetention hearing in an emergency and that Hickox’s 80-hour confinement had not been so unreasonable under the circumstances as to constitute a substantive due process violation.

In *Hickox*, the court put its finger on a problem common to quarantine cases: They tend to arise at times of uncertainty, when the chance of a mistaken or prejudiced decision is pretty high; yet, if there really is an outbreak, a court will be leery of supplanting the judgment of health officials or of punishing them after the fact when their good-faith judgements turned out to be mistaken. Thus “strict scrutiny” is not always so strict in emergency situations. Had Hickox been held longer, in poorer conditions, or with even less evidence, the decision might have been different—but her case shows how difficult it is to win due process cases when there is an ongoing risk of an infectious disease outbreak. Notably, although Hickox did not prevail on her due process claims, her lawsuit prompted New Jersey’s health department to issue new regulations on quarantine that include explicit procedures for notice and a hearing.

## The Requirement of “State Action”

Like other constitutional rights, procedural and substantive due process protections apply only to governmental actions. This is referred to as the *state action doctrine*. Sometimes, what qualifies as a state action is clear: constitutional protections apply to government actions that are codified in law, expressed in policies, and implemented by government officials (*In re Civil Rights Cases*, 1883). State, tribal, local, and territorial health departments are clearly subject to due process requirements and limitations.

In other cases, it may be less clear whether or not there is “state action.” For example, the state action doctrine can apply to organizations sanctioned by government to conduct official functions, such as corporations receiving government funding. Whether or not those entities can be held responsible for due process violations would depend on the specific facts and circumstances of the case. In some jurisdictions, private entities run governmental public health agencies and fulfill basic public health responsibilities written in enabling acts and authorities, from routine inspections of health-care facilities to essential public health services during an emergency. When these actions adversely impact individual rights, courts may apply the state action doctrine to these nongovernmental entities.

Although government actors (or those acting on the government’s behalf) can be held responsible for actions that violate due process rights, it is important to recognize that government’s failure to protect individuals from harms inflicted by private companies or individuals does not violate due process, no matter how severe the injury (*DeShaney v. Winnebago County Dept. of Social Services*, 1989). This is because the Constitution espouses “negative rights” that outline what the government is prohibited from doing but not what it must proactively do. Although this is a long-standing principle of Constitutional law, numerous public health scholars have criticized the “action/inaction” dichotomy as deeply problematic. As they have noted, government inaction in the face of public health threats can also deprive one of life, liberty, and property (Parmet, 1992).

## Conclusion

Beliefs about due process change with the times, and practitioners should know how to identify government actions and decisions that can trigger

a due process issue. By recognizing that each new issue has similarities and differences to long-standing public health actions, practitioners will be able determine what kind of scrutiny or deference will likely be given to government on any particular topic. Courts frequently analyze due process concerns along with those of equal protection, the subject of the next chapter.

## Further Reading

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# 12 | Constitutional Limitations

## EQUAL PROTECTION OF LAW

### Learning Objectives

- Understand the origins of the 14th Amendment’s Equal Protection Clause.
- Identify suspect and quasi-suspect classes and explain the levels of scrutiny courts apply in equal protection review.
- Recognize factors that have historically led to equal protection violations by public health officials.

### Introduction

The concept of fairness resonates in American society. As we move through our daily lives, we want to be treated fairly, especially by the government that represents us. Unfair treatment based on a characteristic a person cannot change—race, gender, disability, sexual orientation—strikes us as particularly egregious. Yet it is easy to name historical instances of this kind of discrimination, from the protection of slavery in the US Constitution through the World War II internment of Japanese-Americans, to bans on gay marriage by officials at all levels. Unfairness can seem obvious in hindsight, but courts have struggled throughout our history with how to address it as it happens. It was the Civil War, not a lawsuit, that led to the abolition of slavery. The Supreme Court’s 1944 decision upholding Japanese internment has never been overturned, although it has been “thoroughly repudiated by history” (Cole & Eskridge, 1994).

The Constitution speaks to the issue of fairness through the 14th Amendment, which requires that the actions of federal and state governments be grounded in principles of equal protection. The Equal Protection Clause, as we shall see, requires that the law treat similarly

situated people in similar ways and that disparate treatment of individuals be grounded in some meaningful difference. This institutional fairness requires that everyone enjoy the “equal protection of the law,” but there are times when all people are not in the same situation, and there are sound policy reasons for drawing lines that are not driven by prejudice. We have good public health reasons, for example, to prevent people less than 21 years old from buying alcohol and to bar unvaccinated children from school.

In public health law cases involving equal protection claims, the courts are faced with difficult questions: What constitutes fair treatment? How do we identify people who should be treated similarly? What kind of evidence is required for governments to justify treating individuals or groups of individuals differently? Can government go too far? This chapter examines the origins of the Equal Protection Clause, provides an overview of equal protection doctrine, and examines its application to issues of public health to answer these questions.

## The Origins of Equal Protection

The Framers included a Due Process Clause in the Bill of Rights, reflecting the experience of arbitrary governance that helped fuel the Revolution. It took a war over slavery to give the concept of equal protection of law an explicit place in the Constitution. After the Civil War, Congress faced the challenge of preventing the reimposition of second-class status on freed slaves through “Black Codes,” laws designed to deny black Americans many rights including voting, holding office, serving on juries, and testifying in certain types of court cases. In part as a response to these codes, Congress amended the US Constitution to secure the freed slaves’ basic civil rights (Goldstone, 2011). The 13th Amendment prohibited slavery, and the 15th Amendment prohibited the denial of voting rights on the basis of race, color, or previous condition of slavery (though this protection did not yet apply to women of color). Central to these Reconstruction Era amendments, the 14th Amendment secured rights to due process and prohibited states from denying any person the equal protection of the laws. Shamefully, it took nearly a century of legal and political advocacy for these legal promises to be seriously enforced, and law has not yet wiped out the unequal protection of laws (Blackmon, 2008).

The 14th Amendment does not create a blanket prohibition against a law creating or recognizing different categories of people or treating

different people differently. As interpreted by the Supreme Court, the core doctrines of the Equal Protection Clause are that similarly situated persons receive similar treatment under the law, and that different treatment be based on meaningful differences (*Johnson v. Robison*, 1974; *Ohio Bureau of Employment Servs. v. Hodory*, 1977). As with due process, the Constitution does not define “equal protection,” and courts’ interpretations have avoided a formulaic description of what equal protection means. Because the requirement has been left purposefully broad over the years since its creation, the application of the Equal Protection Clause to government actions remains nuanced and complex.

## Equal Protection Overview

Laws create classifications and place requirements upon different groups of people and organizations, sometimes for important health-related reasons. State laws that address possessing, purchasing, and drinking alcohol create two groups: people over the age of 21 are regulated one way and people under the age of 21 another. These classifications arise solely from the text of laws, which also create significant penalties for the people who violate them. Yet, legislatures recognized these classifications as acceptable because there is evidence to support the premise that people younger than 21 years old are less able to consume alcohol in a mature and responsible manner and disproportionately impose adverse health and financial consequences on the rest of society (Centers for Disease Control and Prevention, 2016).

Other classifications in the history of public health law have not been accepted as legitimate. In the early 1970s, Oklahoma prohibited males under the age of 21 from buying “nonintoxicating” 3.2% alcohol-by-volume (ABV) beer, but it continued to allow 18- to 20-year old females to buy the same type of beer. A man between the ages of 18 and 20 and a commercial vendor of 3.2% beer filed suit, claiming Oklahoma violated the Equal Protection Clause because it did not treat men and women the same way (*Craig v. Boren*, 1976). The case provides a window into the kind of justification that may be required for a law that treats groups of people differently on the grounds of public health.

Oklahoma defended its law in the Supreme Court as serving the interests of traffic safety and produced statistical evidence showing that males aged 17 to 21 were more likely to be arrested for drunk driving, to be killed or injured in traffic accidents, and to drink beer and drive. It also cited evidence

consistent with these statistics from other states. Although the Supreme Court recognized that traffic safety was an important interest for the state, it pointed out flaws in the statistics and research provided to support the law. The Court found that none of the evidence looked at the dangerousness of 3.2% beer or connected its consumption to gender differences; instead, Oklahoma put forth evidence of alcohol use generally. The Court also pointed out the irony that Oklahoma was pursuing a traffic safety law that addressed supposedly “non-intoxicating” beer. It concluded that the law violated the 14th Amendment and declared it unconstitutional.

The analysis of the evidence tells us that the judiciary, at least in some cases, will look closely for a consistent thread connecting: (a) the distinctions a law makes between different classes of people, (b) the interests the law purports to serve, and (c) the evidence produced to support the law. Two key considerations drive equal protection challenges: whether the text or application of the law is being challenged and the nature of the classification involved.

### Challenging the Text or Application of the Law

The first consideration in equal protection claims to note is whether the text or the application of the law is at issue. An aggrieved party challenging the text of a law can argue that it creates categories or classifications and outlines different treatment for different populations. A party challenging the application of a law can argue that, while the law is neutral on its face, it is being implemented in a discriminatory manner. The distinction implicates the analysis a court will perform.

First, a party may bring an equal protection claim when a law categorizes two or more groups of people differently and has specific requirements or prohibitions attached to those classifications. A proposed law that treats two (or more) categories of people differently should always be carefully reviewed, but note that not all such classifications are invalid. The 14th Amendment prohibits “invidious discrimination” (*Williamson v. Lee Optical*, 1955), but it “does not take from the State the power to classify” in its exercise of the police power (*Lindsley v. Natural Carbonic Gas Co.*, 1911). For instance, a state can use its police powers to bar unvaccinated children from enrolling in school, even though such laws clearly create two classes of people (those with up-to-date vaccinations and those without).

Second, the text of a law may not create a classification, but the government could apply it differently to different groups. For example, state regulations govern drinking water that comes from wells. The texts of

these laws do not create classifications but apply to whomever wants to operate a drinking water well, so that “facially” there is nothing constitutionally invalid about these laws. However, a religious group operating a camp with a community well could claim an equal protection violation if it believed the regulating agency was enforcing the law against it, while ignoring the violations of other similarly situated groups that were not religious. In this situation, the application of the law would run afoul of the Equal Protection Clause by discriminating on the basis of religious beliefs—an impermissible classification.

Proving an equal protection violation when the law is neutral on its face is, however, extremely difficult. The fact that a law has a “disproportionate impact” on a particular group is not enough to establish an equal protection violation. There must also be evidence that the law is being implemented with a discriminatory purpose, as when requiring recruitment procedures that unfairly disadvantage members of certain races (*Washington v. Davis*, 1976).

### The Classification Involved and the Level of Judicial Scrutiny

The second consideration in equal protection cases is the nature of the classifications made by the law or its application. Different types of classifications trigger different types of judicial review. The two levels of judicial scrutiny discussed in Chapter 11 also apply to equal protection cases, with an additional intermediate level, and many claims involve both due process and equal protection issues. Under substantive due process, cases involving fundamental rights trigger strict scrutiny and cases involving nonfundamental rights trigger rational basis review. Under equal protection, laws involving *suspect classes* trigger strict scrutiny, whereas *quasi-suspect classes* trigger intermediate scrutiny, and all other classifications trigger rational basis review. These distinctions have huge implications for governmental actions.

First, laws that divide people into suspect classes and create different consequences for the one class over another receive strict scrutiny. Suspect classes include race and national origin, factors the Supreme Court has stated “are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others” (*City of Cleburne, Tex. v. Cleburne Living Center*, 1985). The Court further explained the need for judicial interpretation because discrimination against minority groups “is unlikely to be

soon rectified by legislative means.” Laws that impose differing burdens on fundamental rights—such as the right to marry, obtain contraception, and raise and bear children—have also been subject to strict scrutiny in equal protection cases, even when a suspect class is not involved.

Beginning with *Craig v. Boren*, the 3.2% ABV beer case discussed previously in this chapter, the Supreme Court also introduced a new level of scrutiny for equal protection cases: *intermediate scrutiny*. Laws that divide people into quasi-suspect classes, such as gender or illegitimacy, and create consequences for one class over another receive intermediate scrutiny. Under intermediate scrutiny, the government must show that the law furthers an important governmental interest through means that are substantially related to that interest. This is a less exacting standard than strict scrutiny but calls a more searching inquiry than rational basis review. In the context of laws addressing gender, the Court has said that although there may be valid reasons for gender-based distinctions, “if the statutory objective is to exclude or ‘protect’ members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate” (*Mississippi University for Women v. Hogan*, 1982).

Finally, laws that create any classification of people other than suspect or quasi-suspect classes fall under rational basis review, requiring only that the law be rationally related to a legitimate government interest. Note that although categories such as age and disability do not receive heightened scrutiny under the Court’s Equal Protection Clause jurisprudence, there are separate civil rights laws prohibiting discrimination on these bases.

## Equal Protection in the Context of Public Health

Public health laws and the agencies that carry them out are subject to the 14th Amendment’s equal protection requirements. As noted, public health laws can create different classifications of people, and many, if not most, of the distinctions are proper exercises of legislative and executive authority. They do not rely on suspect or quasi-suspect classes and are not subject to strict or intermediate scrutiny. For example, governments may use clinical disease criteria to sort people into those who have been potentially exposed to an infectious disease and those who have not. Officials can create permitting schemes for health-related activities, such as for restaurants, and apply different tiers of regulatory requirements based on the risks posed. Licensing laws can require some healthcare professionals

but not others to register with the state. These laws, and many others, typically survive rational basis scrutiny because they are reasonably related to legitimate government interests.

However, when similarly situated people are subject to disparate treatment, either directly in the text of a public health law or through the implementation of an otherwise neutral law, an equal protection analysis may show the treatment to be improperly discriminatory. Equal protection violations in the enforcement of public health laws can stem from two dynamics. First, many public health laws, particularly communicable disease control authorities, are broadly worded so that the laws do not have to be changed with each new disease that emerges as a threat to human health. Second, time is often of the essence with outbreaks and other public health emergencies. The faster that public health can take action, the faster the condition may be brought under control, and political and community pressures to act may be tremendous.

These dynamics can lead to government officials implementing laws in ways that may have discriminatory impact. Particularly in crises, it is all too common for prejudices—including those against race, class, religion, and sexual orientation—to drive policy. Public health agencies may identify and target marginalized populations as perceived sources of infection, as happened when a quarantine line was established around Chinatown in San Francisco during a suspected bubonic plague outbreak at the turn of the 20th century. The quarantine was explicitly designed to cover only Chinese-Americans and immigrants, who were believed to be the source of the disease. Lawyers for the Chinese-American residents went to federal court, which struck down the order (*Jew Ho v. Williamson*, 1900). The court held that the ordinance violated the Equal Protection Clause because (a) the quarantine was “underinclusive,” in that other people who were potentially exposed to the disease were not similarly restricted, and (b) the quarantine was also wildly “overinclusive,” in that there was no reason to believe that *all* people in Chinatown had potentially been exposed. Racial prejudice, rather than epidemiology, seemed to be behind the quarantine.

Nearly a century later, during the early days of the AIDS pandemic, New York City was sued after it sought and obtained an order to shut down a gay bathhouse in an effort to combat the spread of HIV. The evidence presented in court stated that the spread of HIV was associated with what was termed “high-risk sexual activities,” and public health inspectors observed these activities taking place at the bathhouse (*City of New York v. New St. Mark’s Baths*, 1986). However, it was also apparent that the actions of the health department targeted gay men, a minority community

that had traditionally not been part of the political system and had suffered a long history of discrimination. Other groups that engaged in high-risk sexual activity were not similarly singled out. At the time, though, equal protection issues were not even discussed by the Supreme Court because discrimination on the basis of sexual orientation was not considered to implicate heightened scrutiny. Even today, multiple appellate courts have ruled that laws that make distinctions on the basis of sexual orientation are only subject to intermediate scrutiny. The Supreme Court—though it has now recognized a right to gay marriage—has not expressly said what level of scrutiny is appropriate in such cases.

## Conclusion

Equal protection is a doctrine that demands fairness from our laws and the government agencies that enforce them. By attempting to regulate behaviors for the protection of the public's health, some laws will necessarily create different classes of people and call for differential treatment among them. Equal protection requires that these distinctions not be based on irrelevant stereotypes or prejudices and that they have a relationship to the goal that government is trying to achieve. How close the relationship between the government's interest and the distinctions it draws depends on whether or not there are suspect or quasi-suspect classifications involved.

## Further Reading

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