

F.O.R.C.E VIDEO SCRIPT - EQUAL PROTECTION

Voice Over: The Fourteenth Amendment to the U.S. Constitution guarantees “equal protection” to all American citizens. What it means is that our laws are supposed to be based not on who you are, but rather on what you do. It’s a simple idea—but it hasn’t always been simple to apply or understand. In fact, it can get pretty complicated. Fortunately, when it comes to sorting it out, Professor Sheila Kennedy has few equals.

Sheila: It is sometimes said that the pre-eminent American values are liberty and equality. Equal Protection is not the same thing as equality, a word which means different things to different people in different contexts. Your church may say we are all equal in the sight of God, for example. This (constitutional use) is a narrower kind of equality: the right of similarly situated people to be treated similarly by government. “Similarly situated” is a concept that depends upon government’s right to classify persons.

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Governments have to classify citizens for all kinds of perfectly acceptable reasons. We draw a distinction between children and adults, between motorists and pedestrians, between smokers and non-smokers. The Equal Protection doctrine prevents government from imposing inappropriate classifications; those based upon criteria that are irrelevant to the issue, or that unfairly burden a particular group.

The general rule is that a government imposed classification must be rationally related to a legitimate government interest. A requirement that motorists observe a speed limit is clearly a classification related to government’s entirely proper interest in public safety. A law that imposed different speed limits on African-American and Caucasian drivers just as clearly would be improper.

Laws can be discriminatory on their face (for example, a law providing that only white males can vote is clearly discriminatory and unconstitutional); however, these days, laws meant to be discriminatory are usually crafted to achieve that result by design. That is, they are drawn to look impartial on their face, but to have a discriminatory effect.

A rule that all firefighters weigh 180 or more pounds would prevent many more women from being employed than men, despite the fact that one’s weight is not an indicator of strength or the ability to climb a ladder, or perform other tasks necessary to the firefighting profession.

There are also situations in which genuinely neutral laws are applied in a discriminatory fashion. We call that “discriminatory by application.” The phrase “Driving While Black” grew out of statistics suggesting that some police officers were disproportionately stopping black motorists for speeding.

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The courts will look more closely at classifications that burden constitutional rights, or disadvantage members of groups that have historically been subject to discrimination. Racial minorities and women fall into those categories. We call that process of taking a closer look “heightened” or “strict” scrutiny, and in the next segment of this lecture, I’ll be describing the rules that the courts will apply to the various levels of scrutiny.

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The constitutional requirement of equal protection is intended to prevent majorities from using government to disadvantage individuals and minorities of whom the majority may disapprove. Equal Protection guarantees—like all the other provisions in the Bill of Rights—restrain only government. Civil right statutes may address private-sector discrimination.

Essentially, the Equal Protection Clause requires government to treat citizens as individuals, not as members of a group. Laws are supposed to be based upon a person’s civic behavior, not gender, race or other identity. So long as we citizens obey the laws, pay our taxes, and generally conduct ourselves in a way that does not endanger or disadvantage others, we are entitled to full civic equality with other citizens—that is, equality before the law.

That guarantee of equal civic rights is one of the aspects of American life that has been most admired around the globe; it has unleashed the productivity of previously marginalized groups and contributed significantly to American prosperity. It has also irritated people who believe that their gender or skin color or religion or sexual orientation should entitle them to preferential treatment.

The Equal Protection Clause is part of the Fourteenth Amendment. Although it is currently considered part of the Bill of Rights, the Fourteenth Amendment wasn't passed or ratified until after the Civil War. The Amendment's language makes its intent clear:

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"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." States, in other words, were not allowed to deny persons "born or naturalized" in the United States the status of citizens. They were not to deny them any of the rights of citizens. And state and local governments were to treat them as equals in the sight of the law. As we have seen, however, many citizens resented the dictates of the Equal Protection clause, seeing it as an assault on "states' rights."

Equal protection analysis can be complicated. The general (default) rule is that a government classification must be rationally related to a legitimate government purpose. The legitimate purpose doesn't even have to be the real purpose, but there must be a reasonable—legitimate—governmental purpose that can be served by the challenged classification. As the "default" category, the rational basis test will be applied unless there is a reason to examine the situation under heightened or strict scrutiny.

What are those reasons? Courts will apply heightened or strict scrutiny—that is, they will look more closely at the situation—when the classification government is using is "inherently suspect."

Race and national origin (sometimes called "alienage"), for example, will trigger strict scrutiny—the highest level of scrutiny—because America has a history of pervasive discrimination on those bases. In order to pass constitutional muster, laws using those classifications must be narrowly drawn to achieve a compelling government interest. Comparatively few laws that are examined under strict scrutiny will be upheld.

Classifications like gender and legitimacy will trigger heightened scrutiny—sometimes called "intermediate" scrutiny. The heightened scrutiny applied to classifications of legitimacy are a holdover from times when "bastards" or illegitimate children were subject to considerable discrimination. I am aware of no cases challenging laws for discrimination on that basis.

Heightened, or intermediate scrutiny, is almost always invoked in cases of gender discrimination. Those laws will be upheld only if government can provide evidence that they are substantially related to an important government interest.

If a law or government action burdens a fundamental right such as interstate travel, marriage, voting, or access to justice, heightened or strict scrutiny will also be applied.

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Famous cases decided on Equal Protection grounds include *Brown versus Board of Education*, which affirmed the right of African-American children to attend non-segregated schools; *Loving versus Virginia*, in which the Court struck down state laws prohibiting interracial marriage, and held that the Equal Protection Clause required strict scrutiny to apply to all race-based classifications. The Court also held that laws rooted in invidious racial discrimination could never achieve a compelling government interest. The Court ruled that the application of rigid racial quotas violated the Equal Protection Clause.

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As I noted previously, laws can be discriminatory on their face, by design, or as applied. As you might imagine, a facially discriminatory law is easy to challenge; it is harder to prove that a law has been designed to disfavor some citizens, and it is extremely difficult to prove that a facially neutral law has been applied in a discriminatory fashion.

Making these cases even more difficult, the Courts have ruled that when a law is challenged on Equal Protection grounds, the challenger must provide evidence that the deprivation was intentional. The law doesn't need to be entirely based on a discriminatory motive, but some part must be shown to be purposeful. And that evidence can be difficult to get.

Evidence of mere disproportion—the fact that application of the law ends up favoring some and disfavoring others— is not enough: laws granting benefits to veterans, for example, will benefit more men than women, but that doesn't mean that such laws violate equal protection.

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An early case provides us with an example: In 1880, the city of San Francisco adopted an ordinance requiring all laundries in wooden buildings to obtain a permit from the city's Board of Supervisors. The justification was safety: laundries at the time used fires to heat water, and wooden buildings were far more apt to catch fire. At the time, individuals of Chinese descent operated more than two-thirds of San Francisco's laundry businesses. The Board of Supervisors had the discretion to grant or withhold permits, and it denied permits to nearly all Chinese owners. Interestingly, all other operators of laundries in wooden buildings were able to obtain permits.

Yick Wo and Wo Lee were fined and arrested for operating their laundries without a permit. They sued, and the lower courts denied their claims because the ordinance was not discriminatory as written. The Supreme Court held that the biased enforcement of the law violated the Constitution, even though it was impartial on its face. The administration of the law was directed exclusively against a specific class of people and ran afoul of the Equal Protection Clause.

As one legal scholar has written, the problem with requiring evidence of purposeful discrimination is that few people are willing to display that intent:

"When faced with increasingly subtle mechanisms of discrimination, the Court has been unwilling to invalidate state action that, though neutral on its face, tends to perpetuate racial stereotypes, oppression, and political impotence. The Court instead has placed increasing emphasis on judicial restraint and deference to local initiative. The legal underpinning of this growing restraint has been the requirement that plaintiffs demonstrate that state officials conceived or maintained the challenged law for a discriminatory purpose. In an age when bigoted legislators can no longer be expected to make their motivations public, the Court has placed an extraordinary burden on plaintiffs by focusing on purpose rather than effect."

When we think about Equal Protection, it is important to remember that the Equal Protection Clause restrains only government. Discrimination by private organizations or businesses is subject to civil rights laws, and those laws may or may not include prohibitions against certain kinds of private discrimination. In Indiana, for example, our state civil rights law only recently was amended to include protection from discrimination based on sexual orientation, and still doesn't protect people who have been discriminated against on the basis of gender identity.

So—if a privately owned bar refused service to women or Blacks, it would be in violation of Indiana law, but if it refused to serve transgendered patrons, it wouldn't.

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There are all kinds of reasons people give for denying equal protection to disfavored groups. We are all familiar with religious arguments against same-sex marriage, for example—and there used to be similar arguments against the 1964 civil rights act (my religion says whites and blacks should be separated and women should be submissive...)

But since government cannot favor one religion over others or over non-religion, opponents of same-sex marriage had to come up with secular, non-religious. legal arguments for denying same-sex couples the rights taken for granted by opposite-sex couples, and that was a lot harder.

The main argument was that opposite sex couples could procreate—have children. But there are people who can't have children, and people who marry when they are too old to have children, so that argument wasn't particularly persuasive. Ultimately, the Courts concluded that there were no sound secular reasons for denying same-sex couples the significant legal benefits that come with marriage.

As we have seen with laws against interracial marriages and same-sex marriages—and many other things—the Equal Protection doctrine is intended to prevent government from disadvantaging individuals and minorities of whom majorities may disapprove.

But remember: Equal Protection guarantees—like all the other provisions in the Bill of Rights— only apply to government actions. Civil Rights statutes address private-sector discrimination. Here in Indiana, for example, civil rights statutes don't forbid discrimination on the basis of sexual orientation or gender identity, so except in a city or town with a civil rights ordinance, private companies can fire someone for being gay, or refuse to sell a pizza to someone perceived to be gay.

Essentially, the Equal Protection Clause requires government to treat citizens as individuals, not as members of a group. American laws are supposed to be based upon a person's civic behavior, not her gender, race or other identity. So long as we obey the laws, pay our taxes, and generally conduct ourselves in a way that doesn't endanger or disadvantage others, we are entitled to full civic equality. That guarantee of equal civic rights has unleashed the productivity of previously marginalized groups and contributed significantly to American prosperity.

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If you still aren't quite certain about the difference between civil liberties and civil rights, let me go through it one more time. Civil liberties are the individual freedoms protected by the Bill of Rights. Only the government can violate your civil liberties. Civil rights took a lot longer to achieve, and were—and still are—a lot more controversial. Congress passed the Civil Rights Act in 1964. Civil rights laws protect people against private sector discrimination in employment, housing or education.

The original Civil Rights Act applied to businesses engaged in interstate commerce—businesses that held themselves out to be “public accommodations” but were, shall we say, “selective” about which segments of the public they were willing to accommodate. State and local civil rights acts followed passage of the federal law. Civil rights laws generally include a list of characteristics that cannot be used to discriminate against people: race, religion, gender, and so forth.

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