

The Key Clauses: The Impact of the Due Process and Equal Protection Clauses on State and Local Governments

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Introduction

The Fourteenth Amendment has arguably had a greater impact than any other provision of the U.S. Constitution on state and local government. This impact derives from the amendment's incorporation of the protections afforded by the Bill of Rights, its establishment of national and state citizenship, and the protections afforded by two critical clauses: the due process clause and the equal protection clause. This essay will explain how these two clauses have affected the operations of state and local governments, explaining the Supreme Court's interpretation and application of each clause as well as how state and local governments have responded to these rulings.¹

Due Process: Substantive and Procedural

The due process clause of the Fourteenth Amendment states simply that no "State [shall] deprive any person of life, liberty, or property, without due process of law." In interpreting this clause, the Supreme Court has recognized two types of due process: *procedural* due process and *substantive* due process.

Substantive due process, the more complex concept, addresses whether there are certain areas where government action or regulation is inherently "undue," a quality of action that government simply cannot undertake. In the first three decades of the twentieth century the Court occasionally ruled unconstitutional certain state regulations on businesses because it felt they were outside the "due" scope of governmental powers. Some commentators use this same line of reasoning today to argue that certain private behaviors, such as reproductive issues and sexual orientation and behavior, are also outside the realm of appropriate (or "due") government powers. However, because this complex concept is one the Court has largely eschewed, this essay focuses on the more obvious and commonly applied concept of procedural due process.

Procedural due process is understood to mean that when a state or local government seeks to take some sort of action against an individual that adversely affects that individual (their life, liberty, or property), the state must follow certain procedures to protect the individual's rights. The most obvious example is in criminal proceedings. In order to deprive someone of his or her liberty (through incarceration), property (through fines or forfeitures), or life (by capital punishment), states must abide by certain procedures. The accused person must be provided an attorney, cannot be subject to unreasonable searches, does not have to testify

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against himself or herself, must be given the option of a trial by jury, is protected against double jeopardy, and is protected against cruel or unusual punishments (among other protections).

However, state and local governments are responsible for more than just criminal proceedings. Institutions such as public universities, parks, school districts and individual schools, and public libraries are all considered forms of state "government." This means that the due process clause applies to them as well. As a result, these bodies must provide procedural due process in their actions against individuals, whether that action is to dismiss a tenured professor or teacher, terminate welfare benefits, or revoke parole or probation.

An example relevant to high school students is a school district's power to suspend or expel students. The Supreme Court has ruled that a child has a property interest in a public education (in other words, a public education has a material benefit to children), and so depriving a student of access to public education is "a serious event in the life of a suspended child."² Even if a student is to be suspended for 10 days or fewer, the Court has held that due process requires "that the student be given oral or written notice of the charges against him (or her), and if he (or she) denies them, an explanation of the evidence the authorities have and an opportunity to present his (or her) side of the story."³ However, the Supreme Court has also recognized that schools need to maintain order, and it would be impractical to require a school district to go to court every time it sought to suspend or expel a student, or to provide an attorney to students. Instead, school districts must create and abide by processes that give a student notice of the charges against him or her and the ability to respond to those charges. School boards are then responsible for determining the guilt or innocence of the student and the appropriate punishments.

In short, the due process clause protects individuals from the arbitrary adverse actions of state or local governments by ensuring that procedural safeguards are followed.

The Equal Protection Clause and Strict Scrutiny

While the Declaration of Independence states as a self-evident truth that “all men are created equal,” it took nearly a century after Thomas Jefferson penned those words for the concept of equality to find its way into the U.S. Constitution. The equal protection clause of the Fourteenth Amendment, the first place in the U.S. Constitution in which the fundamental equality of individuals is acknowledged, states that “no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” This clause has become a powerful tool in striking down discriminatory state laws, but it raises the question: what does “equal protection” mean?

Importantly, the equal protection clause does *not* mean that everyone must be treated equally by the state. Rather, it means that a state government must provide “equal protection”; that is, when a state government treats people differently, it must have reasonable—and in some cases compelling—reasons for doing so.

An effective way to convey these different levels of scrutiny is to describe three hurdles of varying height. The highest hurdle that state laws need to clear in order to be upheld is the “strict scrutiny” standard. This standard requires that the government show that it has a compelling reason for the law in question, and that that compelling reason also advances a legitimate end of government. In equal protection cases, compelling reasons are necessary when different treatment by the government is based on race or national origin. These categories are called “suspect” classifications because of the history of *de jure* discrimination minority groups have experienced from state governments. Put differently, laws that treat people differently based on their race or national origin are considered to be the most suspect, and the courts use the “strict scrutiny” standard to determine whether they violate the equal protection clause. The state government must show that there is a *compelling* need for the law, and that the differing treatment based on race or national origin is necessary to achieving that compelling need. As a result of this strict standard, most laws that treat people differently because of their race or national origin have been struck down by the courts.

This standard was stated particularly clearly in a case that upheld a race-based restriction. Soon after the Japanese attack on Pearl Harbor in December 1941, the U.S. government

ordered that citizens of Japanese descent be “excluded” from large areas of the country near the Pacific Ocean. In *Korematsu v. United States* (1944) the Supreme Court upheld the constitutionality of this policy while still applying the strict scrutiny standard for equal protection claims. In the majority decision of the Court, “Legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.” Importantly, while the Court in *Korematsu* found a compelling reason to segregate Japanese Americans, it should be stressed that few constitutional scholars today agree with the Court’s reasoning, and in 1988 Congress awarded every formerly interned Japanese American \$20,000 in reparations. Each also received an apology on behalf of the American people signed by President Ronald Reagan. Nonetheless, *Korematsu* is a clear example of the application of the strict scrutiny standard for Equal Protection claims.

A useful example of a case when the Court used the strict scrutiny standard to strike down a law comes from 1966. In *Katzenbach v. Morgan* the Court struck down a New York election law that required that voters be able to read and write English.⁵ In the just-enacted Voting Rights Act of 1965, however, Congress had declared that no person could be denied the right to vote in any election because of his or her inability to read or write English. In invalidating the New York law the Supreme Court contended that New York violated the equal protection clause by denying equal treatment to non-English speakers because of their national origin. As a result of this ruling, local election jurisdictions are required by the Voting Rights Act to provide ballots in multiple languages whenever five percent of the people in their jurisdiction belong to a “language minority.”

Intermediate Scrutiny and Legitimate State Purposes

The second highest hurdle for laws to clear in equal protection cases is for laws based on gender (sex). State governments have passed many laws that treat men and women differently, but unlike race-based laws, the courts have adopted an “intermediate strategy” to determine if these laws are constitutional. The logic underpinning this determination is that there are more legitimate reasons to treat people differently based on their gender than on their race, but that the long history of gender-based discrimination means that we must be initially skeptical about those reasons. The states thus have a higher hurdle to clear with gender-based laws than with other laws, but not so high a hurdle to clear as with race-based laws.

Under the intermediate scrutiny standard, the Supreme Court has upheld a state law that punished men but not women for sexual intercourse if the woman was younger than 18.⁶ It upheld a federal law requiring males to register for the draft but not women,⁷ while striking down another law that awarded widows a survivor’s benefit but not widowers. However, it also required Mississippi University for Women, a state-supported all-female institution, to admit men to its nursing program.⁸

Finally, the lowest and easiest hurdle for laws to clear exists for laws treating people differently for reasons other than their race or gender. According to judicial doctrines, these need only have a “rational basis” for their existence and be linked to a “legitimate state purpose.” For example, the progressive income tax used by the federal government and 34 states treats people unequally: Wealthier taxpayers are assessed a higher tax rate than poorer taxpayers. Advocates of progressive taxes justify this nominally unequal treatment by pointing out there is a rational basis for such unequal treatment in that wealthier individuals have greater discretionary income than poor individuals, and can thus afford to pay more. Raising revenue to fund its operations and activities is also clearly a legitimate state function. Progressive income tax rates are thus acceptable under the equal protection clause. However, were a state to impose a higher income tax rate on men than on women, or a tax on whites but not on blacks, it would be a clear violation of the clause.

In short, if a state passes a law that treats people differently because of their race or national origin, it must have a compelling reason for doing so; if it passes a law based on gender, it must have a very good reason for doing so. Finally, if it treats people differently for reasons other than race, national origin, or gender, it must merely have a reasonable (or good) reason for doing so.

The Equal Protection Clause and Court Decisions

The equal protection clause is the underpinning of some of the most momentous and controversial Supreme Court decisions in American political history, as it is the metric against which school segregation and affirmative action programs have been measured. In *Plessy v. Ferguson* (1896) the Supreme Court ruled that state laws segregating the races in public facilities did not violate the equal protection clause so long as those facilities were equal, even if they were separate. This “separate but equal” doctrine protected so-called “Jim Crow” laws throughout the South for over half a century. In 1954, however, the Supreme Court famously ruled that separate facilities were inherently unequal,⁹ and hence a violation of the equal protection clause. This started an avalanche in which countless segregationist laws were struck down or repealed, but also raised new dilemmas for state and local governments.

In many areas, not only did state laws or local rules segregate children into white and black schools, business practices also effectively segregated the races residentially. As a result, even if rules creating separate schools for each race were eliminated, the schools would still be effectively segregated because the neighborhoods surrounding them and feeding into them were segregated.

In order to integrate the races into their schools, school districts have tried many different approaches. One strategy was to bus students who lived in one area to a school in a different area. This generally meant taking black or Hispanic students from their largely minority neighborhoods and busing them to largely white schools in largely white neighborhoods.

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Another strategy was to create magnet schools in minority neighborhoods. These magnet schools would offer special programs to attract white students to the largely minority neighborhoods. Yet another strategy was to abandon the concept of neighborhood schools and instead assign families to schools based on the racial makeup of that school.¹⁰

Equally controversial for state and local governments has been the issue of affirmative action. One of the key unresolved issues in constitutional law—and hence in state and local diversity efforts—has been whether laws or ordinances intended to correct discrimination against one group can violate the equal protection clause by discriminating in turn against another group. How far can public colleges and universities go in trying to admit more African American and Hispanic students (or fewer white and Asian students)? What can local governments do to try to steer or reserve contracts for minority-owned businesses without discriminating against white-owned businesses?

In the end, the equal protection clause has proven to be a powerful tool not in promoting equality, which is neither the clause's intent nor function, but in reducing discriminatory acts by government. Coupled with the power of the due process clause, the equal protection clause has undoubtedly expanded the protections individuals have from capricious or arbitrary government actions.