

## “Lessons in Equal Protection”

Tuesday, Oct. 25 at the CMBA  
(1301 E. 9<sup>th</sup> St. Second Level, Cleveland 44114)  
1:30-2:30 p.m.

### Speaker:

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The program will provide a bird's-eye overview of Equal Protection jurisprudence from the passage of the 14<sup>th</sup> Amendment through today. Included will be the context of the amendment at the time of its passage (post-Civil War, Jim Crow laws), and how equal protection concepts are interpreted and reflected today in such issues as LGBT rights, voter ID laws, and affirmative action.

**Wilson R. Huhn** is a C. Blake McDowell, Jr., Professor and Associate Director of the Constitutional Law Center at The University of Akron School of Law. He currently teaches courses in Constitutional Law, Advanced Constitutional Law, Jurisprudence, and Commercial Paper.

He received his B.A. at Yale University and J.D., *cum laude*, at Cornell University, where he was a member of the Cornell Law Review. Prof. Huhn taught high school social studies in El Paso, Texas, from 1972 to 1974, and for many years at the University of Akron he directed programs in law for secondary school students with both the Governor's Institute and Upward Bound.

Prof. Huhn's recent and forthcoming publications include *Constantly Approximating Popular Sovereignty: Seven Fundamental Principles of Constitutional Law*, 19 William and Mary Bill of Rights Journal 291 (2010); *Ten Questions on Gay Rights and Freedom of Religion*, Akron Journal of Constitutional Law and Policy (online journal) (July 31, 2009); AMERICAN CONSTITUTIONAL LAW (University of Akron Press, forthcoming); and *A Higher Law: Abraham Lincoln's Use of Religious Imagery* (RUTGERS JOURNAL OF LAW AND RELIGION, forthcoming 2011).

The graduating class selected Professor Huhn Outstanding Professor of the Year in 1987, 1997, 1999, 2003, 2005 and 2008, the Akron law alumni awarded him the Outstanding Publication prize in 2004 and 2006, and the law faculty named him the "Most Valuable Player" for his contributions to legal scholarship, 2001-03. Professor Huhn volunteers his time on community boards and is active organizing and coaching adaptive recreation programs for youths with special needs.

Visit Prof. Huhn's websites on Constitutional Law (<http://sites.google.com/site/huhnconstitutionalaw/>) and Health Care Financing Reform (<http://sites.google.com/site/healthcarefinancingreform/>). Prof. Huhn posts regularly at [akronlawcafe.ohio.com](http://akronlawcafe.ohio.com), which features essays by members of the Akron Law School faculty.

You may access Professor Huhn's articles at <http://ssrn.com/author=83790>.

## Introduction to Equal Protection

Prof. Wilson R. Huhn

October 25, 2011

In Support of The 3Rs Program, Cleveland Metropolitan Bar Association

By 1864 Abraham Lincoln and the Republican Party were not only intent on abolishing slavery, but they had also repeatedly promised to enshrine the principle “all men are created equal” from the Declaration of Independence into the United States Constitution.

Slavery was abolished in 1865 with the adoption and ratification of the 13<sup>th</sup> Amendment. The following year Congress adopted the 14<sup>th</sup> Amendment, which was ratified by the states in 1868. In 1870 the nation adopted the 15<sup>th</sup> Amendment which guarantees the right to vote to all persons regardless of race.

The 14<sup>th</sup> Amendment contains the Equal Protection Clause, which states:

No state shall ... deny to any person within its jurisdiction the equal protection of the laws.

The 14<sup>th</sup> Amendment was adopted in part because all of the southern states – and some northern ones – denied the newly-freed black race equal rights. After slavery was abolished the southern states enacted “Black Codes” that essentially retained intact the law of slavery and the protected the principle of White Supremacy. For example, any unemployed African-American person could be fined by the state and contracted to work for a white person until the “fine” was paid off. In the north, some states barred free blacks from residing within the state. The Equal Protection Clause was intended to strike down these laws and to guarantee equal rights to the newly-freed slaves.

But the words of the Equal Protection Clause and the words of the supporters of the 14<sup>th</sup> Amendment go beyond race. They announce a universal principle of equality applicable to all persons.

For several decades after the Civil War the Supreme Court enforced the Equal Protection Clause only sporadically. During this period the Supreme Court upheld laws requiring segregation on trains (*Plessy v. Ferguson* (1896)) and the public schools (*Gong Lum v. Rice* (1927)). The Court even upheld laws that prohibited interracial marriages (*Alabama v. Pace* (1883)).

After 1938 the Supreme Court began to vigorously enforce the Equal Protection Clause against laws that promoted racial discrimination and segregation. Some of the early cases in this period are *Missouri ex. Rel. Gaines v. Canada* (1938) (ordering the State of Missouri to admit blacks to the state’s only public law school); *Smith v. Allwright* (1944) (outlawing the “White Primaries” that had prevented blacks from voting in primary elections); *Shelley v. Kraemer* (1948) (declaring it unconstitutional for a court to enforce a racially discriminatory restrictive covenant); and *Sweatt v. Painter* (1950) (holding that it was unconstitutional for the State of Texas to prohibit African-Americans law students from attending the prestigious University of Texas). Finally in 1954 the Supreme Court issued its decision in *Brown v. Board of Education* in which it declared state-enforced segregation in the public schools to be unconstitutional.

In 1971 in the case of *Reed v. Reed* the Supreme Court extended the Equal Protection Clause to guarantee equal rights for women. Also in 1971 in the case of *Graham v. Richardson* the Court ruled that the Equal Protection Clause prohibits the states from discriminating against aliens (non-citizens), and this protection was extended to the children of undocumented workers in the case of *Plyler v. Doe* (1982). In 1985 in *City of Cleburne v. Cleburne Living Centers* the Court ruled that the Constitution also prohibits discrimination against persons with mental disabilities. Finally, in 1996 and 2003 the Supreme Court struck down laws that discriminated on the basis of sexual orientation. *Romer v. Evans* (1996); *Lawrence v. Texas* (2003).

There are many complex and difficult questions that arise under the law of Equal Protection. The following questions and problems are intended to illustrate the principal doctrines that govern this area of constitutional law.

## Eight Questions

### **1. What is the central purpose of the Equal Protection Clause?**

All laws treat people differently to some degree. The purpose of the Equal Protection Clause is to outlaw *invidious* discrimination, that is, discrimination that is unfair.

The Supreme Court has in many cases summarized the purpose of the Equal Protection Clause in these words: “Persons who are similarly situated must be treated alike.” If a group of people are the same as other people in a particular context, then the law must treat them the same within that context. Another way of saying the same thing, and a formula that the Supreme Court has often used, is that a group of people may be treated differently only if there are “real differences” between them and other people – differences that are relevant to the purposes of the law.

### **2. Does the Equal Protection Clause only apply to racial discrimination, or does it apply as well to other forms of discrimination?**

The Equal Protection Clause applies to any and all classes or classifications of human beings. It prohibits unfair discrimination on the basis of race, gender, nationality, age, wealth, intelligence, sexual orientation, or any other characteristic.

However, some classifications of persons are more “suspect” than others – that is, some laws classifying persons will be subjected to more scrutiny than laws that discriminate on the basis of other characteristics.

### **3. What are the standards of review that apply in Equal Protection cases?**

The Supreme Court has identified three standards of review in Equal Protection cases: Strict Scrutiny, Intermediate Scrutiny, and the Rational Basis test. Under strict scrutiny, the government must have a “compelling” reason for treating a group of people differently. Under intermediate scrutiny, the government must have an “important” reason for treating people differently. Under the rational basis test, the government needs only a “legitimate” reason for treating people differently.

### **4. How does the Supreme Court determine whether or not a law will be evaluated under “strict scrutiny,” “intermediate scrutiny,” or the “rational basis” test?**

If a law denies a group of people the opportunity to exercise a “fundamental right” then strict scrutiny applies, and the government has the burden of proving that there is a compelling reason for the law to deny a specific group of people the opportunity to exercise that right.

In addition, if the law treats a group of people differently on the basis of a “suspect classification” then strict scrutiny applies. If the law discriminates on the basis of a “quasi-suspect classification” then intermediate scrutiny applies. Strict scrutiny and intermediate scrutiny are sometimes referred to as “heightened scrutiny.”

If the law does not affect a fundamental right and does not draw lines among people based upon “suspect” or “quasi-suspect” classifications, then the relatively low-level rational basis test applies.

## 5. What makes a particular classification more or less “suspect,” thus triggering intermediate or strict scrutiny?

There are four factors that the courts take into account in determining whether a classification is “suspect,” “quasi-suspect,” or “non-suspect.” These are:

a. **History of discrimination.** Has the government historically discriminated against this group of people? If so, laws directed against this group are more likely to be subjected to heightened scrutiny.

b. **Politically powerless.** Is the group unable to adequately defend itself through the democratic process? If so, that is a reason for the courts to evaluate laws directed against the group through the skeptical lens of heightened scrutiny.

c. **Immutable characteristic.** Does the law single people out for discrimination because of a trait that they were born with or that they are powerless to change? If so, that tends to raise the level of scrutiny that the law is subject to.

d. **No relation to ability to perform.** Does the characteristic that the law uses to discriminate among classes of persons bear any relation to people’s ability to perform or contribute to society? If not, that is another reason to use heightened scrutiny.

## 6. What classifications have been determined to be “suspect,” “quasi-suspect,” and “non-suspect”?

The Supreme Court has ruled that race and nationality are suspect classifications; that gender is a quasi-suspect classification; and that wealth, age, and intelligence are non-suspect classifications. As a result, strict scrutiny applies to any case involving racial discrimination, including affirmative action cases. Intermediate scrutiny applies in gender discrimination cases. And the rational basis test applies to cases involving age discrimination, or discrimination against persons with mental disabilities.

## 7. If strict scrutiny applies is the law automatically unconstitutional? If the rational basis test applies, is the law automatically constitutional?

No. Although laws that are subject to strict scrutiny are presumptively unconstitutional and laws that are subject to rational basis are presumptively constitutional, in both cases the presumption is rebuttable.

For example, even though the strict scrutiny test applies to laws that discriminate on the basis of race, an affirmative action admissions program at a state university may be constitutional if it is narrowly tailored to achieve its purposes. *Grutter v. Bollinger* (2003). The Supreme Court has ruled that there are compelling reasons for a state university to take race (as well as many other factors) into account in creating a diverse student body. Similarly, even though the rational basis test applies to laws that discriminate on the basis of disability, if a city’s zoning laws unfairly deny mentally retarded persons the opportunity to live in a group home, the law may be struck down. *City of Cleburne v. Cleburne Living Centers* (1985). In the first case, the government had a compelling reason to create the affirmative action program. In the second case, the government did not have even a legitimate reason to deny a variance to the owners of the group home. The *Cleburne* case also stands for the proposition that the government may not treat a group of people differently simply out of dislike or irrational fear.

## 8. What are some examples of the operation of the Equal Protection Clause in the area of fundamental rights?

The most common example of discriminatory laws affecting fundamental rights are voting rights cases. The Supreme Court has ruled that malapportionment (substantially unequal numbers of voters in

election districts) is unconstitutional because it denies the equal right of each and every citizen to participate in the political process. *Reynolds v. Sims* (1964). Similarly, the Court has ruled that poll taxes are unconstitutional because they deny poor people an equal right to vote. *Harper v. Virginia Board of Elections* (1966). When the law deprives people of an equal opportunity to exercise a fundamental right, strict scrutiny applies.

## Two Problems

**9. Same-sex marriage.** The law of Ohio limits marriage to one man and one woman, and does not recognize same-sex marriages from other states. Does this law violate the Equal Protection Clause?

- A. What standard of review applies?
  - 1. Is marriage (or same-sex marriage) a fundamental right?
  - 2. Is sexual orientation a suspect or quasi-suspect classification?
- B. Does the law pass the applicable standard of review?
  - 1. Under the rational basis test, does the government have a legitimate reason to treat same-sex couples differently from opposite-sex couples with respect to marriage?
  - 2. If heightened scrutiny is applicable, does the government have an important or compelling reason to deny same-sex couples the right to marry?

**10. Photo ID for voting.** Please assume that the state enacts a law requiring voters to show a government-issued photo identification when they appear to vote. University identification cards do not qualify a person for voting; under the law only drivers licenses and state-issued ID cards may serve this purpose. Although the state law requires that photo identification cards be provided to voters at no charge, in order to obtain a photo ID a person must present a certified birth certificate, and to obtain a certified birth certificate there is a charge of \$25.00. Does this combination of laws violate the Equal Protection Clause?

- A. What standard of review applies?
  - 1. Do these laws substantially interfere with a person's fundamental right to vote?
  - 2. Do these laws treat people differently based upon a suspect or quasi-suspect classification?
- B. Do these laws pass the applicable standard of review?
  - 1. Does the government have a legitimate reason to require voters to present a government-issued photo identification upon voting?
  - 2. If heightened scrutiny applies, does the law impose too substantial a burden upon low-income persons in the exercise of their right to vote?