Fundamentals of Constitutional Law for Legal Services and Pro Bono Practitioners: Due Process and Equal Protection

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INTRODUCTION

This manual is intended to convey to legal services and pro bono attorneys the basic information necessary to present constitutional claims on behalf of low-income clients and to encourage attorneys to explore whether constitutional claims may exist in a case and, if so, how best to present them before administrative agencies or the courts.

The Center for Human Rights and Constitutional Law is available to answer questions and provide technical support to legal services and pro bono attorneys assisting low-income clients with potential constitutional claims. You may call Peter Schey at 213-388-8693 ext. 304 or Carlos Holguin ext. 309, or email us at pschey@centerforhumanrights.org or crholguin@centerforhumanrights.org. We prefer to receive emails explaining the case, and then to discuss the case via telephone or an in-person meeting.

Many legal services and pro bono attorneys overlook, or avoid altogether, bringing constitutional claims because they feel they do not know enough about constitutional law to include such claims. We recommend that legal services and pro bono lawyers be more aggressive in including constitutional claims in their advocacy, even if the lawyer does not have "expertise" in this area. Constitutional claims are not difficult to make. In effect, whenever confronting a case, the legal services or pro bono attorney should ask her or himself: (1) does the treatment of my client appear to violate any relevant statutes such that I should include a statutory claim in my advocacy, (2) does the treatment of my client violate any agency regulation(s), or do regulations applied to my client appear to violate the authorizing statute, in which case these claims should be included in legal filings, (3) does the treatment of my client violate an agency policy, or is a policy inconsistent with existing regulations or statutes, in which case this claim should be made.

To assert a constitutional claim, the attorney must evaluate two additional and important questions: (1) does the treatment of my client seem to be procedurally unfair, in which case the client may possess a procedural due process claim, and (2) does the treatment of my client seem unfair, even possibly irrational, because another group of similarly situated people are treated more favorably. These are often fairly subjective judgment calls. They do not initially require a lot of legal research. At the outset, the attorney should ask her or himself: (1) why is the procedural treatment of my client unfair; (2) in how many ways is it unfair; (3) what are the adverse consequences of the unfairness; (4) how could the unfairness be remedied; (5) how difficult would it be for the government agency involved to remedy the unfairness; and (6) what are the rights of my client impacted by the unfairness (how important is the deprivation suffered by the client because of the perceived unfairness)? These are questions with logical and generally straightforward answers. They do not involve deep legal research. Assuming your approach is reasonable (i.e. would be considered reasonable by an average listener or judge), and you conclude after some thought that the treatment is unfair, that the client's rights involved are important, that there are ways the Government agency involved could fairly simply remedy the unfairness, your client may possess a strong

procedural due process claim worth including in any administrative filing or court complaint the lawyer prepares. Once the attorney has thought through these questions, and perhaps created a memorandum listing the questions and answers, we would be happy to provide support by discussing the possible procedural due process claim, how it should be presented, and what precedent cases may support the validity of the claim.

Regarding a possible equal protection claim, the legal services or pro bono attorney should ask a similar set of questions about the case. This may require some thinking and discussions with others who may offer ideas, but often does not require initial legal research. The question we routinely ask ourselves when trying to determine whether we can include an equal protection claim in a case is: can we identify some group of people who basically seem to be in the same situation as our clients but are treated better or more advantageously by the agency involved (or by statute or regulations) than our clients? This requires some thinking and consideration as it may not be obvious at first what other groups are indeed similarly situated and yet receive better treatment than the client's group receives.

If there are some identifiable groups that are treated better than the client, the legal services provider should then consider the following additional inquiries: (1) how does the government justify the difference in treatment between these different groups? (2) does the difference in treatment make sense? Or stated another way, how many reasons can the attorney come up with that show that the difference in treatment is irrational, or without substantial justification? (3) How difficult would it be for the government to provide the client's group equal treatment with another similarly situated group? Once the attorney has thought through these questions, and perhaps created a memorandum listing the questions and answers, we would be happy to provide support by discussing the possible equal protection claim, how it should be presented, and what precedent cases may support the validity of the claim.

Raising constitutional claims in administrative or court proceedings (in addition to any other claims the client may possess) often helps to drive the case towards settlement and resolution. Government agencies do not want to risk having their regulations, policies or practices declared unconstitutional. Therefore, we have often found that the presence of constitutional claims, even if not strong claims, drives a case towards settlement. The constitutional claims are always presented as a back-up to statutory or regulatory claims that may be made. One should not wait to formulate and present potential constitutional claims. They should be made at the earliest possible time, whether in an informal administrative meeting, an administrative hearing or appeal, or in a court.

We hope this manual is useful to legal services and pro bono attorneys and encourages them to identify and assert constitutional claims wherever possible.

Peter Schey
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I. SOURCES OF DUE PROCESS AND EQUAL PROTECTION RIGHTS

A. Fifth Amendment

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

B. Fourteenth Amendment

Section. 1. "… 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."

C. Which Amendment Applies?

The Due Process Clause of the 5th Amendment applies only to the Federal Government. The 14th Amendment applies only to the States and their subdivisions (counties, cities, and their agencies). Both the 5th and the 14th Amendments provide that the government shall not take a person's "life, liberty, or property" without due process of law.

D. Are the due process protections different as applied to the federal versus state governments?

The Supreme Court has interpreted those two clauses identically. As Justice Felix Frankfurter once explained: "To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection."[1]

E. California Constitution

California Constitution - Article 1, Declaration of Rights

> SEC. 7. (a) **A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws**; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation.

Procedural due process under the California Constitution differs from federal procedural due process "in that the claimant need not establish a property

[1] *Malinski v. New York*, 324 U.S. 401, 415 (1945), (Frankfurter, J., concurring).

or liberty interest as a prerequisite to invoking due process protection."[2] Procedural due process under the California Constitution is "'much more inclusive' and protects a broader range of interests than under the federal Constitution."[3]

F. Who must act in conformity with due process?

Both 5th and 14th Amendment due process protections only apply to governmental actors, not private citizens. Private citizens or companies are not required to provide people with "due process." Federal, state and local government officials and agencies are required to provide due process to those they deal with or whose eligibility for benefits they determine.

II. ENFORCEMENT OF CONSTITUTIONAL RIGHTS

The U.S. Constitution is today recognized as a generative source for private causes of action, even though nothing in the Constitution itself or federal legislation expressly authorizes private remedies. Thus, in appropriate circumstances, individuals whose constitutional rights have been violated may recover damages directly under the Constitution by virtue of this judicially created remedy.[4]

The law of federal civil rights offers two types of constitutional claims. The choice depends on whether the defendant is a state or a federal official. Injured citizens can sue state and local government officials and entities under 42 U.S.C. 1983; federal officials can be sued under the federal common law rule established in *Bivens v. Six Unknown Named Agents*.

A. Challenges against the Federal Government

1. Federal Question Jurisdiction

Bivens suits, which are available against federal officials for violations of the Fourth, Fifth, and Eighth amendments, are grounded in federal common law. A plaintiff can use 28 U.S.C. § 1331 to sue federal officials or agencies for violating constitutional

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[2] *Ryan v. California Interscholastic Federation - San Diego Section*, 94 Cal. App. 4th 1048, 1069 (2001).
[3] *Id.*
[4] *See generally: Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (the *Bivens* case concerned an arrest and search conducted by six federal narcotics agents. The plaintiff alleged that these agents, under color of federal authority, entered his apartment without a warrant and arrested him for alleged narcotics laws violations. The agents threatened to arrest the entire family and searched the apartment. The plaintiff was subsequently taken to the federal courthouse where he was interrogated, booked, and strip-searched. Bivens brought an actions alleging a cause of action under section 1983 (see discussion below), asserting federal question jurisdiction, and seeking damages. The Supreme Court held that Bivens had stated a cause of action directly under the Fourth Amendment for which damages were recoverable upon proof of violations of the Amendment.)

rights. Section 1331 is the principal basis of federal jurisdiction in litigation against the federal government and its agencies for injunctive relief. Section 1331 provides that "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

When raising an alleged constitutional violation by any federal agency or employee, and seeking declaratory and/or injunctive relief, the plaintiff will almost always rely upon 28 U.S.C. § 1331 as the basis for asserting jurisdiction in the U.S. District Courts.

Under *Bivens*, individual employees of the federal government are subject to *suit for damages* for acts in violation of plaintiffs' "well-established" federal constitutional rights.[5]

Bivens suits present more or less the same remedial options and immunities as Section 1983 actions (discussed *infra*). The most significant difference is that the United States government generally retains sovereign immunity for its own unconstitutional acts, though it has assumed limited vicarious liability for those of its officers.[6] The federal official enjoys the same qualified, or "good faith" immunity as the state counterpart, except that the President, unlike a state governor, is absolutely immune from damage suits when acting in his or her official capacity.[7] Attorney fees are generally not available in these suits.

In addition, Congress has enacted a variety of specific jurisdictional statutes governing particular kinds of litigation against the government based on the nature of the judicial proceeding or the subject matter of the controversy. These jurisdictional grants may also contain specific remedial provisions that establish conditions to suit or create immunities.

2. Mandamus Jurisdiction

We do not generally recommend bringing a case as a mandamus action. Mandamus actions require that the plaintiff prove a mandatory duty to do something by a government official or agency. In response to a mandamus action, the defendant(s) will always argue that their duties are discretionary, not mandatory. This results in confusion and a lot of legal briefing on the subject. There are also special procedural rules that apply only to mandamus proceedings that both litigants and judges are often not as familiar with compared to the regular rules that apply when litigating a non-mandamus case. We generally litigate simply for declaratory and injunctive relief, and do not ask for mandamus relief. This seems to accomplish the goals of the litigation.

If you do include a mandamus claim, then it is best to make your complaint for declaratory and injunctive relief, and mandamus relief in the alternative. This puts the

[5] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971)
[6] Federal Torts Claims Act §171, 28 U.S.C. § 2680.
[7] See Nixon v. Fitzgerald, 457 U.S. 731 (1982).

issue of mandamus relief on the back burner. At bottom, we see no need to rely upon mandamus relief when seeking to vindicate a client's constitutional rights in either a state or federal court.

On the other hand, there are some circumstances where mandamus is the way a remedy is normally sought. If a court has issued an interlocutory order you disagree with and believe immediate review in the court of appeals is appropriate, such an action may be brought as a mandamus.

Section 1361 of Title 28 confers on the district courts "jurisdiction of any action in the nature of mandamus to compel" a federal officer, employee, or agency "to perform a duty owed to the plaintiff." The mandamus jurisdiction conferred by this provision is available only if the plaintiff has a clear right to relief, the duty breached is "a clear nondiscretionary duty," and no other remedy is available. If a federal official, however, goes far beyond "any rational exercise of discretion," mandamus may lie even when the action is within the statutory authority granted.

The significance of this statute as a separate source of federal jurisdiction has faded with the abolition of the amount in controversy requirement for federal question jurisdiction and with the elimination of the sovereign immunity defense to suits against federal agencies, officers, and employees for injunctive relief.

B. Challenges against State and Local Officials for U.S. Constitutional Violations

The Civil Rights Act, section 1983[8] allows a plaintiff to sue state and local (but not federal) officials who have violated U.S. constitutional or statutory rights.[9]

If a state or local official or agency deprives a person of state constitutional or state or local statutory rights, the client may be able to sue that official under state law. However, section 1983 allows a plaintiff to sue that official under federal law regardless of whether a state remedy is available.

Section 1983 authorizes a wide variety of suits against state and local governments and officials for deprivations of federal rights under color of state law, while other Reconstruction statutes authorize more limited claims against private parties who violate federal rights. Section 1983 litigation has vindicated constitutional and statutory rights in the context of health, welfare, education, housing, employment, and

[8] Reconstruction Civil Rights Acts, 42 U.S.C. §§ 1981-1988.
[9] *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994) (affirming that it is 42 U.S.C. § 1983 that provides a federal cause of action for the deprivation of rights secured by the United States Constitution); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979) (explaining that 42 U.S.C. § 1983 was enacted to create a private cause of action for violations of the United States Constitution).

prison law in litigation against state, county, or municipal officials. Section 1983 creates no substantive rights. Rather, it creates a vehicle for enforcing existing federal rights.[10]

Although the majority of section 1983 claims are brought in federal court, state courts are also competent to hear them. Section 1983 provides a full range of civil remedies – damages, injunctive, and declaratory relief, and prevailing party attorney fees.

Note that challenges against state or local agencies or officials alleging a violation of a federal constitutional right can be brought in a federal court (including with pendent state claims), or could be brought as a pendent claim in a state court, assuming your primary claims are based on state law. However, we normally would bring such claims in a U.S. District Court (after addressing the claims before any applicable administrative agencies) because in our experience, state court judges do not appear too eager to deal with federal constitutional claims brought as pendent claims in a state court action.

In summary, we recommend that if an attorney has identified potential violations of U.S. constitutional rights by state or local agencies or officers, the claims be presented in a federal court, with any added state claims brought as pendent claims. This general rule may not apply if, for example, there are no relatively impartial federal judges in the jurisdiction where the claim may be litigated, there are impartial state court judges, and the client's case raises strong state law claims. Under these circumstances, it would make sense to file a case in the appropriate state court, and add as pendent claims any alleged violations of the U.S. Constitution under section 1983.

1. Civil Rights Act of 1871, Section 1983

The statute provides in pertinent part:

> *Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, ...*[11]

The underlined words and phrases state the three elements required when bringing a lawsuit under section 1983. In the Complaint, a plaintiff must allege that *all three* elements are met.

[10] It may be noted that Section 1983 is unnecessary for the purpose of vindicating discriminatory practices and laws, for example, since any invidiously discriminatory state rules or practices will be enjoined by the Fourteenth Amendment itself. However, at the time of the passage of the Act, it was not known whether the Supreme Court would interpret the Amendment as self-executing.
[11] 42 U.S.C. § 1983.

(a) First Element: Person

Section 1983's first requirement is to show a "person" violated plaintiff's constitutional or federal statutory rights. But, the legal definition of "person" for section 1983 claims includes more than actual people. A city, county, or municipality can also be a "person" under section 1983.[12]

The definition of "person," however, does not include *state* governments and their agencies.[13] For example, a plaintiff cannot sue the State of California or the State Department of Corrections under section 1983.[14] Thus, while a plaintiff may sue *officials* (actual people) at any level of government (including state government) under section 1983, a plaintiff may sue only *non-state governments* and their agencies (such as cities, counties, local agencies, and private corporations) as "persons" under Section 1983.

A section 1983 complaint filed in federal court must name a defendant who is not immune under the Eleventh Amendment, and must seek relief not barred by the Eleventh Amendment. If the plaintiff establishes a violation of a federal right,[15] defendants may in certain circumstances avoid liability for damages by proving a qualified immunity.

- **Immunity for Officials under Eleventh Amendment**

The Eleventh Amendment limits official capacity claims against state officials to prospective injunctive relief. However, it does not affect damage claims against those officials in their individual capacity. When the Amendment applies, it totally bars a federal court from granting any relief against a state or the United States, its agencies or instrumentalities, and officials. On the other hand, state officials are not immunized by the Eleventh Amendment when sued in their personal capacity.[16] Therefore, they can be enjoined from acting in violation of federal law (whether constitutional, statutory, or regulatory) and they can also be held personally liable for damages (although they may be able to invoke individual immunity defense). The doctrine of individual immunity is a well-established limitation upon the right of recovery under section 1983 and there are a handful of cases extending the doctrine to actions brought under at least some of the other Reconstruction statutes.

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[12] *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978) (holding that municipalities and local governments are considered "persons" under § 1983, but limited the scope of the agency's liability to only those instances where the deprivation resulted from that agency's custom, policy or practice).

[13] *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45, 58 (1989) (holding that states may not be sued under § 1983).

[14] You may, however, be able to sue states and state agencies under other federal laws such as the Americans with Disabilities Act. *See* 42 U.S.C. §§ 12101–213 (2006).

[15] *See, e.g., Paul v. Davis*, 424 U.S. 693 (1976) (allegation that police wrongfully circulated damaging information about plaintiff did not state a Fourteenth Amendment violation and hence did not state a § 1983 cause of action; plaintiff limited to state law remedies).

[16] *Ex parte Young,* 209 U.S. 123 (1908).

By its terms, section 1983 imposes liability without defense on state and local officials who, acting under color of law in their individual capacity, deprive plaintiffs of rights created by the Constitution and federal law. Nevertheless, the Supreme Court, drawing on common law, created absolute immunity from liability for some government officials and qualified immunity for others. Absolute and qualified immunity were developed to protect officials from lawsuits for actions relating to their official duties.

Absolute immunity bars any action against officials in the conduct of their office even for actions taken maliciously or in bad faith. Absolute immunity focuses on the governmental function being performed and the nature of the responsibilities of the official, not on the specific action taken. Qualified immunity (or "good faith" immunity[17]) on the other hand, affords only incomplete protection and will not shield an official from liability for damages in all circumstances even if the official is acting in his/her scope of authority. Qualified immunity protects public officials from personal liability unless their conduct violates "clearly established" constitutional law at the time of the alleged violation(s).[18]

The U.S. President enjoys absolute immunity from suits for damages arising from his conduct as President. But every other executive official, from cabinet officials and governors, legislators, and judges performing administrative functions, to the tens of thousands of public employees exercising state and local authority such as law enforcement officers and schoolteachers, enjoy only qualified immunity from suit.

(b) Second Element: Under Color of State Law

The second requirement for suing under section 1983 is that the person who violated the plaintiff's rights acted "under color of" state law. This means the defendant must be someone or a local agency acting under the state's or a local government's or agency's authority. States have authority over their agencies and employees; over cities, counties, and municipalities; and city, county, and municipal employees.

(c) Third Element: Deprived of a Federal Right

The third and final element is that the person sued must have deprived plaintiff of a right, privilege, or immunity under the U.S. Constitution or under federal law. Constitutional provisions that are enforceable by a private party under section 1983 consist of those which create personal rights and either explicitly apply to the states, or have been held to apply to the states by operation of the Fourteenth Amendment. For

[17] Defined in *Wood v. Strickland*, 420 U.S. 308 (1975).
[18] *Scheuer*, 416 U.S. at 240. The Supreme Court recently observed that "[q]ualified immunity balances two important interests--the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials form harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009).

example, under the Fourteenth Amendment both state and local governments are required to afford people due process and equal protection of the laws.

The three-pronged test for finding a right enforceable under section 1983 is set forth in *Wilder v. Virginia Hospital Association*.[19] It asks whether: (1) Congress intended a particular statutory provision to benefit the plaintiff, (2) the provision is not so vague or amorphous as to make judicial enforcement difficult or impractical, and (3) the statute imposes a binding obligation on the government.[20] After these inquiries, a fourth arises: Did Congress create a comprehensive mechanism for enforcing the statute, which implies that it intended to deny a private right of action?[21] Each of these prongs emerged from a series of Supreme Court decisions, with the first element undergoing something of a metamorphosis as it rose in importance in comparison to the other prongs of the test. Resolution of this first inquiry will usually be the key to whether section 1983 can be invoked to enforce a federal statute.

2. Procedural Issues and Section 1983

Procedural hurdles can arise in section 1983 cases. One of the most important is exhaustion of state administrative remedies.

(a) Exhaustion of State Remedies Is Usually Not Required

Under *Monroe v. Pape*, a plaintiff is not required to exhaust any available state court remedies before invoking section 1983, because the purpose of this statute is to open federal courts to claims that federal rights were violated.[22]

In *Patsy v. Board of Regents*, the leading case on this issue, the Court excused plaintiff's failure to raise an employment discrimination claim in a state administrative proceeding.[23] Pointing to section 1983's purpose of opening the federal courts to plaintiffs seeking the vindication of federal rights, the Court ruled that Congress had not intended that plaintiffs first exhaust any available state administrative remedies. For the same reason, a section 1983 plaintiff is not required to first file an administrative claim for government reimbursement even when state law requires such a submission prior to filing suit.[24]

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[19] *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990).

[20] *Id.* at 509-512 (1990). *Wilder* actually lists these factors in reverse order. However, since *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997), the factor which asks whether the statute benefits the plaintiff has generally been listed first. This is appropriate because it has become the main battleground for the use of § 1983 to enforce federal statutes.

[21] *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981).

[22] *Monroe v. Pape*, 365 U.S. 167 (1971); *see also McNeese v. Board of Education*, 373 U.S. 668 (1963).

[23] *Patsy v. Board of Regents,* 457 U.S. 496 (1982).

[24] *Felder v. Casey,* 487 U.S. 131 (1988) (a plaintiff who files a § 1983 action in state court is not required to comply with state pre-litigation "notice of claim" requirements.) *Felder,* however, does not bar a state court from requiring that a § 1983 plaintiff comply with neutral state court

(b) Exhaustion of Administrative Remedies and the Ripeness Doctrine

To circumvent the general non-exhaustion rule, defendants have argued for the dismissal of section 1983 actions on ripeness grounds.

They may argue that the claim is not ripe for review because the issue *could* have been raised and resolved at the administrative level. While a plaintiff can respond that such a ripeness argument is actually only a disguised exhaustion claim, which should be rejected, resolution of the issue will turn on whether the challenged action is "final" in its effect on the plaintiff.

In an administrative proceeding where plaintiff's claims may be resolved with or without regard to any federal issues, the agency may argue, with some justification, that the claims are not fit for judicial review until the agency has had a chance to review its initial decision.[25] Absent a final hearing decision, the agency might argue that it has not conclusively taken an adverse position to the plaintiff. In the section 1983 context, however, an agency action is nevertheless "final" for ripeness purposes when the agency's action is so definitive as to have resulted in a deprivation of federal rights, even if administrative remedies have not been exhausted.

In *Williamson County Regional Planning Commission v. Hamilton Bank,* the Court addressed the interplay between the "finality" principle and the section 1983 non-exhaustion rule.[26] In that case, the court dismissed a challenge to a zoning rule on the

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procedural rules. It does excuse compliance with those that would "frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court." *Id.* at 141. Thus, in *Johnson v. Fankell*, 520 U.S. 911 (1997), the Supreme Court validated a state court's application of a procedural rule that prohibited interlocutory appeals, even though, contrary to the practice in federal court, application of the rule forbade a government employee from immediately appealing the denial of summary judgment based on qualified immunity. The Supreme Court reasoned that the state rule was not "outcome determinative" in that "postponement of the appeal until after final judgment will not affect the final outcome of the case." *Id.* at 921.

[25] In the Ninth Circuit, for example, a case can be dismissed for failure to exhaust even in the absence of a statutory administrative appeal when "(1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review." *United States v. California Care Corporation*, 709 F.2d 1241, 1248 (9th Cir. 1983) (in a suit by the Department of Health and Human Services for recoupment of Medicare payments received by providers, the providers' objections to the suit were rejected out of hand because they had not been first raised with Blue Cross). Similarly, in *Affiliated Professional Home Health Care Agency v. Shalala*,164 F. 3d 282, 286 (5th Cir. 1999), a suit for Medicare payments, couched as a claim for violation of constitutional rights, was dismissed for failure to exhaust administrative remedies.

[26] *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 192-93 (1985).

ground that the lawsuit was not ripe because the plaintiff bank, when faced with a rule that could have stripped its property of economic value, sued the zoning agency instead of asking for a variance. Had the variance been granted, the property loss would have been avoided or curtailed. If the variance had been denied, resulting in a deprivation of economic value in violation of the Fourteenth Amendment, the case would then have become ripe for review. In response to the argument that section 1983 does not require exhaustion, the Court wrote:

> *The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. Patsy [v. Board of Regents] concerned the latter, not the former.*[27]

These principles apply in the legal aid context. For instance, if a food stamp agency or public housing authority issues a notice of action which affects an individual and, on its face, violates federal law, an aggrieved plaintiff may sue without first invoking any available administrative agency appeals. The agency's action has "inflict[ed] an actual concrete injury." While an administrative proceeding could remedy the injury, so could a lawsuit. Because section 1983 does not require exhaustion, a plaintiff can go directly to court.

C. Choice of Court – State or Federal?

Article III, Section 2 of the U.S. Constitution lists the categories of cases over which federal judicial power may extend. Title 28, Section 1331 of the United States Code confers upon federal district courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Section 1331, which grants federal question jurisdiction, is an all-purpose jurisdictional statute,[28] available regardless

[27] *Id.* at 192.

[28] In addition to the general federal question jurisdiction conferred by Section 1331, Congress has enacted a number of more specific statutes conferring jurisdiction on the district courts in cases arising under particular federal laws. One of these grants jurisdiction of cases arising under any congressional act regulating commerce, 28 U.S.C. § 1337(a) . Section 1337 and provisions conferring jurisdiction in admiralty, bankruptcy, and patent, trademark, and copyright cases (28 U.S.C. §§ 1333, 1334, and 1338) are in the district court jurisdiction chapter of the Judicial Code (Chapter 85 of Title 28). Others, such as the provision for district court jurisdiction of actions to review adverse social security decisions, are in other titles of the Code, typically in agency organic statutes. Besides conferring jurisdiction in the federal courts, such organic statutes may waive sovereign immunity, create causes of action, or specify relief.

of the defendant's identity and, since 1980, is not limited by any requirement that a minimum dollar amount be in controversy. Section 1331 (and 28 U.S.C. § 1343) also confers jurisdiction in actions authorized by 42 U.S.C. § 1983 against defendants acting under color of state law.

In determining whether state courts are allowed to entertain jurisdiction over federally created causes of action, the Supreme Court has applied a presumption of concurrency. Under this presumption, state courts may exercise jurisdiction over federally created causes of action as long as Congress has not explicitly or implicitly made federal court jurisdiction exclusive.[29] As mentioned above, state courts may exercise jurisdiction over claims brought under 42 U.S.C. § 1983.[30]

III. GENERAL PRINCIPLES OF PROCEDURAL DUE PROCESS

Procedural due process refers to the fairness and accuracy of the decision-making process. At a minimum, due process requires that an affected individual be given notice that government intends to take some action and an opportunity to be heard at a meaningful time and place. "The essential requirements of due process … are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement."[31]

A. The Right to Notice

Notice must be reasonably designed, prompt, and specific to insure that affected persons will in fact learn of the proceedings in sufficient time to allow them to protect their interests.

- ***Example – Right to adequate notice in Section 8 proceedings:***

Recently, in *Swords To Plowshares v. Smith,*[32] the court explained that adequate notice with specificity was required in terminating Section 8 housing for a low-income tenant.

Plaintiff, a non-profit California corporation that provided housing to low income veterans (landlord), instituted an eviction proceeding against defendant tenant, who allegedly became delinquent in the payment of rent and engaged in behavior that

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[29] *Yellow Freight System, Incorporated v. Donnelly*, 494 U.S. 820, 822 (1990). (Congress may, of course, expressly permit state courts to entertain certain federal claims. State courts are authorized to hear claims arising under the Fair Labor Standards Act, 29 U.S.C. § 216(b), the Equal Pay Act, 29 U.S.C. § 206, the Age Discrimination in Employment Act, 29 U.S.C. § 626(c)(1), and Title VIII actions involving housing discrimination,42 U.S.C. § 3613(a). State courts have concurrent jurisdiction over Title VII claims. *Id.* at 820.)

[30] *See Haywood v. Drown*, 556 U.S. 729, 731 (2009); *Patsy* v. *Board of Regents of Florida*, 457 U.S. 496, 506-07 (1982); *Maine v. Thiboutot,* 448 U.S. 1, 3 n.1 (1980).

[31] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985).

[32] 294 F. Supp. 2d 1067 (N.D. Cal. 2002)

threatened the safety of other tenants. The tenant moved to dismiss for failure to state a claim.

The tenant first contended that the complaint did not contain specific, non-conclusory allegations describing the manner of service. The landlord claimed to have served the tenant in compliance with the requisite federal and state law provisions.

> The court held that:
> "[F]ailure by the landlord to provide **specificity required in termination notice**, by itself and without regard to subsequent procedures available to the tenant, rendered the notice defective. Although the claims identified the tenant's specific conduct, such as pushing another tenant against a kitchen table and threatening another tenant with a hammer or knife, **the notice failed to identify the alleged victims, and the times and dates that the conduct occurred**. The landlord could not cure the deficiency since it occurred in the eviction notice. Finally, the eviction notice for nonpayment specifically identified the amount by which the tenant was delinquent and the time period during which the nonpayment occurred. No other detail was necessary."[33]

- ***Example – Right to present objections:***

In another recent case, *Palmer v. Upland Hous. Auth.*,[34] a federal district court examined the adequacy of an agency's Section 8 notifications to potential residents and the right to a hearing on the benefits to be cut.

Plaintiffs, a mother and her 27 years old son (Ms. Palmer and Mr. Palmer), lived together in a Section 8 subsidized housing complex. When Mr. Palmer was 18 years old, his mother placed him on the Section 8 Waiting list.

In 2003, while Mr. Palmer was living with Ms. Palmer, there was an error in Ms. Palmer's tax return that resulted in the Upland Housing Authority (UHA) overpaying the amount of rental assistance for Ms. Palmer. Ms. Palmer subsequently entered into a repayment agreement with the UHA, where she repaid the majority of the money owed in monthly installments. At some unspecified time before Ms. Palmer's final payment, the UHA sent Ms. Palmer a warning statement, which Ms. Palmer signed, stating that she owed a balance of $391.98 to the UHA. At some later time, but still before Ms. Palmer's final payment, the UHA realized that this amount was in error, and sent another warning statement reflecting a balance of $1,000, which Ms. Palmer refused to sign.

Ms. Palmer refused to pay the additional $1,000 because the UHA refused to provide her with documents supporting the miscalculation and the new amount due. As a result, in January 2007, Defendants terminated Ms. Palmer from participation in the Section 8 program.

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[33] *Id.*
[34] 2013 U.S. Dist. LEXIS 27211, 28-29 (C.D. Cal. Feb. 21, 2013)

At the time of Ms. Palmer's termination, Mr. Palmer was 21 years old. Mr. Palmer did not know why she was terminated, nor was he aware of her alleged debt to the UHA. After Ms. Palmer was terminated from Section 8, Mr. Palmer became homeless. He was unable to find housing. About three years later, Mr. Palmer was interviewed for Section 8 eligibility and was given a voucher that authorized him to search for a one-bedroom residence. During this time, the UHA conducted a search to determine if Mr. Palmer or his family owed any debts to the UHA.

On June 13, 2012, the UHA sent Mr. Palmer a form letter notifying him that his Section 8 application had been denied because his family owed rent or other amounts to UHA. The letter stated that Mr. Palmer could request an informal review, within 15 days of the date of the letter, which he did. After the informal review, UHA sent a letter to Mr. Palmer upholding the denial. The letter did not give any information beyond confirming the termination and did not state that Mr. Palmer had the option of appeal. Mr. Palmer, through the ICLS, has requested repeatedly copies of his file from the UHA, but has been refused.

Plaintiffs argued that the UHA did not provide prompt written notification of its denial of either Plaintiff's Section 8 application. Plaintiffs further argued that the UHA's written denial notices did not present sufficient information on the informal review process, e.g., not providing a time frame for the review process nor explaining how to present written or oral evidence. Defendants pointed out, this additional information is not required by the regulations. All that is required is a statement that the applicant may request an informal review of the decision and describe how to obtain the formal review.[35]

The court held that a delay of approximately five months before sending written notification, after the UHA notified Mr. Palmer that his Section 8 application was denied, cannot reasonably be considered prompt..[36] Furthermore, the alleged debt owed by Ms. Palmer was no longer "currently owed" because it was barred by the statute of limitations in California. Therefore, this past debt was not sufficient grounds for denial of Section 8 assistance to Mr. Palmer.[37]

The Court determined that the procedures utilized by the UHA in responding to each plaintiff's request for informal review were inadequate because they **failed to allow plaintiffs the opportunity to present written or oral objections** to the UHA's decision. These procedures presented a risk of erroneous deprivation of the plaintiffs' private interest. The court found that there "is probable value in procedural safeguards, for instance, by allowing for an opportunity to present written or oral objections" and that "[t]his is, in fact, required by the regulations."[38]

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[35] *Upland Hous. Auth.*, U.S. Dist. LEXIS 27211 at 24.
[36] *Id.* at 23.
[37] *Id.* at 33.
[38] *Id.* at 29.

- ***Example – Right to pre-termination notice and hearing for Medicaid recipients:***

In *Cota v. Maxwell-Jolly,*[39] plaintiffs, elderly and disabled adult Medicaid recipients, brought a class action against defendants, the California Department of Health Care Services and its director, to enjoin funding cuts in the Medi-Cal Adult Day Health Care (ADHC) program.

The recipients sought to prevent defendants from implementing new, more restrictive eligibility requirements for ADHC services. The court granted the recipients' motion after determining that they established a likelihood of success on the merits.

The court found that the recipients showed a likelihood of success on their due process claim. The State argued that the determination of whether an individual qualifies for benefits will be made by private ADHC providers, and as such, the State's purported lack of involvement in that process. The court held that the State's attempt to "pass the buck" is unpersuasive. As the sole state agency administering Medi-Cal, the State is obligated to ensure compliance with federal law. Medicaid generally requires a State to conform to federal guidelines prior to receiving federal funds. As such, the State cannot disclaim responsibility for compliance with federal law based on its decision to rely on private entities to administer ADHC services. Finally, the recipients sufficiently established irreparable harm and a balance of hardships and public interest favored the recipients.

B. Coherent Standards

- ***Example: Non-arbitrary administration of General Relief & Welfare Benefits***

Due process requires non-arbitrary administration of welfare benefits[40] and the deprivation of due process may give rise to an action under section 1983. Such deprivations include an unreasonable delay in acting upon a public assistance application.[41]

In *Griffeth v. Detrich,* plaintiffs – recipients of General Relief benefits, challenged the constitutionality of San Diego County's procedure for reviewing benefits applications. In this class action, plaintiffs claimed that the County's procedures did not meet procedural due process requirements.

In San Diego, the County Board of Supervisors had delegated responsibility for administration of the County's General Relief program to the Department of Public Welfare and its director. Plaintiff Griffeth applied to the Department for general relief

[39] 688 F. Supp. 2d 980 (N.D. Cal. 2010).
[40] *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Griffeth v. Detrich*, 603 F.2d 118 (9th Cir. 1979), *cert. denied* 445 U.S. 970 (1980).
[41] *See Like v. Carter*, 448 F.2d 798 (8th Cir. 1971).

benefits. She had been fired as a waitress because her employer claimed her dress was improper. Griffeth disputed the alleged impropriety at the screening interview for general relief benefits. Her application, however, was denied because she was "apparently fired for cause." Plaintiff requested and received an administrative review. A supervisor reviewed plaintiff's file and once tried unsuccessfully to reach her former employer. The supervisor denied her application.

The Ninth Circuit held that the interest in General Relief benefits is an interest protected by the Fourteenth Amendment and constituted a statutory entitlement.[42]

> "California state court decisions confirm the mandatory nature of general relief. In *Mooney v. Pickett*, supra, the California Supreme Court struck down the general relief regulation of San Mateo County, which denied benefits to "employable" single men. That Court held that "(section) 17000 imposes a Mandatory duty upon the counties to support "all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident.' … The Court examined the legislative history of the statute and the general relief programs and found that excluding persons from relief because they are unmarried and employable was inconsistent with the law. On remand, the Court of Appeal referred to the mandatory nature of Section 17000 and held that "(consequently), the obligation to provide appellant with General Assistance became a debt due from the county as of the date he was first entitled thereto." 26 Cal.App.3d 431, 435, 102 Cal.Rptr. 708, 711… As plaintiffs' expectation of benefits is an interest protected under the Fourteenth Amendment, it is necessary to determine whether the procedures provided by San Diego County meet due process requirements.[43]

C. Protected Interest

For due process requirements to attach, the client must have at stake either a property interest (*i.e.*, a legal claim of entitlement) or a liberty interest. Liberty interests include physical freedom and freedom from certain types of stigma, such as those that impair one's ability to obtain employment.

- ***Example – Property Interest in Subsidized Tenancy for Low-Income Tenant:***

Recently, in *Anchor Pacifica Management Co. v. Green*,[44] the court considered the protected property interest of a disabled, low-income individual who resided in low-income housing.

The tenant, who was disabled and received federal income-supplement benefits, resided in a subsidized low-income housing unit that was part of a privately operated

[42] *Griffeth*, 603 F.2d at 120.
[43] *Griffeth*, 603 F.2d at 121 (internal citations omitted).
[44] 205 Cal. App. 4th 232 (2012).

apartment complex developed on city-owned land with assistance from a local redevelopment agency. Her annual lease had been twice renewed and her rent subsidy approved through the end of the fiscal year. The subsidies set aside under the development agreement had consistently been paid. The management company served the tenant with **an eviction notice that provided no reason for the termination** of her tenancy at the conclusion of her lease. The tenant argued that she had a due process right to renew her lease absent good cause for eviction.

The court held that:

> "A protected property interest may be terminated or withdrawn by governmental action only for cause.[45] The company's action constituted state action that deprived the tenant of a protected property interest under the Fourteenth Amendment, U.S. Const., 14th Amend., and under Cal. Const., art. I, § 7, subd. (a). The circumstances demonstrated a pattern of overt city encouragement and participation in the low-income housing activities of the apartment complex (so as to constitute state action). Here, the inception and regulation of the low-income housing program at the complex was infused by the City's power, and there is no substantial reason to claim unfairness in applying constitutional standards to it."[46]

The court found that the low-income tenant was deprived of a legitimate property interest:

> "That a low-income tenant receiving subsidized housing benefits has a property interest in her continued tenancy seems apparent. As the *Appel* court recognized, "The right to decent housing at a rent that can be afforded, the right not to be uprooted, the right to stability as a participant in a particular community, and the right to be left alone are all substantial personal rights … . The worth of such rights to a tenant is insusceptible of pecuniary valuation.'"[47]

Finally, the court held that good cause was required before an agency could terminate a legitimate entitlement:

> "Good cause must be shown even when a tenancy is terminated at the end of the lease.[48] The evidence presented to the court at the evidentiary hearing on this issue confirms the City, through its policies and practices, fostered the tenants' expectation she had an entitlement to a continued subsidized tenancy at Heritage Oaks Apartments that could be terminated only upon a showing of good cause.[49] Thus, the tenant had a **legitimate entitlement** to the renewal of her lease, as well as the accompanying rent subsidies, and she **could not be evicted without good cause**."[50]

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[45] *Green,* 205 Cal. App. 4th at 239.
[46] *Id.* at 244-245 (citations omitted).
[47] *Id.* at 245-246 (citing *Appel v. Beyer,* 39 Cal. App. 3d Supp. 7, 15).
[48] *Id.* at 246.
[49] *Id.* at 247.
[50] *Id.*

D. What Property Interests are Protected?

In *Board of Regents v. Roth*, the Supreme Court defined the property interest protected by the Fourteenth Amendment as a "legitimate claim of entitlement" to the item or benefit in question.[51] Such "entitlements" are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[52]

"Property interests" include ownership of tangible or intangible property, as well as statutorily created entitlements or rights. An abstract need or desire for a benefit is not enough.[53]

In *Board of Regents v. Roth,* plaintiff Roth, a teacher who had lost his job, was held not to have been terminated without due process because, lacking tenure, he "surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require ... giv[ing] him a hearing."[54] In *Perry v. Sinderman*, the companion case to *Roth*, the Court stated that an untenured teacher might, nevertheless, have a property interest if he could show the existence of "such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at the hearing."[55] Although "a mere 'expectancy'" is not protected by due process, the Court held that the aggrieved party "must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of the 'policies and practices of the institution.'"[56]

- ***Examples of protected property interests:***

(1) Public education. There is a property interest in public education when school attendance is required. Thus, a significant suspension triggers procedural due process. *Goss v. Lopez* 419 U.S. 565 (1975).

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[51] *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).
[52] *Id.*
[53] *See Board of Regents*; *Leis v. Flynt,* 439 U. S. 438 (1979).
[54] *Board of Regents v. Roth, 408 U.S.* at 578.
[55] 408 U.S. 593, 602 (1972).
[56] *Id.* at 602, 603 (citations omitted). Some cases have held that the expectation of receiving a benefit can be a property interest that supports a due process claim when the state deprives the potential plaintiff of a procedure to vindicate that expectation. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), a property interest was found in the expectation that the state would provide a procedure for determining a plaintiff's disability discrimination claim. However, procedures alone and not tied to tangible benefits, are not property rights. *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). In that case, the Court held that no property right inheres in something that the government provides or takes away at its discretion. Moreover, even if the arrest of violators of domestic violence restraining orders were mandatory, the Court held that the entitlement to enforcement was not a property right. Enforcement of an order against a third party would, according to the Court, only incidentally or indirectly create a benefit.

(2) Income-maintenance benefits. One has a protected property interest in welfare benefits, at least if the recipient has previously been found to meet eligibility criteria.[57] The *Goldberg* Court decided that procedural due process in the case of welfare recipients required: (1) timely and adequate notice to the recipient of the reasons for the termination; (2) an opportunity to confront any adverse witnesses and present arguments and evidence orally; (3) an opportunity to be represented by counsel at the recipient's expense; (4) an impartial decisionmaker; and (5) a decision that rests solely on the legal rules and evidence adduced at the hearing, and states the reasons for the determination and upon what evidence the determination relies.[58]

There is also a protected interest in unemployment compensation.[59]

(3) Continued public employment. If a statute or ordinance creates a public employment contract, or there is some clear practice or mutual understanding that an employee may be terminated only for cause, there is a property interest in continued public employment. *Arnett v. Kennedy,* 416 U.S. 134 (1974). If the employee holds her position only at the will of the employer, no protected property interest exists. *Bishop v. Wood,* 426 U.S. 341 (1976); *compare Board of Regents v. Roth*, *supra*(terminating probationary teacher does not trigger due process).

(4) No protected interest. *Compare DeShaney v. Winnebago County Social Servs. Dep't*, 489 U.S. 189 (1989) (no due process violation where state fails to protect abused child from his parent, even where abuse detected by social service agency); *Collins v. City of Harker Heights*, 503 U.S. 115 (1992) (failure of city to warn employees about workplace hazards does not violate due process; due process clause does not impose a duty on the city to provide employees with a safe working environment).

(5) Public Housing – Section 8. The controlling authority establishes that Section 8 participants have a property interest in housing benefits by virtue of their "membership in a class of individuals whom the Section 8 program was designed to benefit."[60]

In *Nozzi v. Hous. Auth.,* the Ninth Circuit held that plaintiffs' property interest is protected against an abrupt and unexpected change in benefits.[61] Here, recipients of federal housing assistance payments under the Section 8 Housing Voucher Program and the Los Angeles Coalition to End Hunger and Homelessness (collectively "plaintiffs") challenged the Housing Authority of the City of Los Angeles ("HACLA"), which administers the Section 8 Program on failure to provide adequate notice of its planned reduction of the voucher payment standard, which is used to calculate plaintiffs' monthly housing assistance payments.

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[57] *Goldberg v. Kelly,* 397 U.S. 254, 262-264 (1970).
[58] *Id. at 267–68, 270–71.*
[59] *Sherbert v. Verner*, 374 U.S. 398 (1963).
[60] *Nozzi v. Hous. Auth.*, 425 Fed. Appx. 539, 541 (9th Cir. Cal. 2011), *citing Ressler v. Pierce*, 692 F.2d 1212 (9th Cir. Alaska 1982).
[61] *Nozzi,* 425 Fed. Appx. at 541.

Applying federal and California due process principles, and finding them to be identical, the court held that pre-termination notice and hearing were required under due process because "the consequences of a sudden reduction in benefits to a Section 8 participant could be potentially devastating." The court remanded the case back to the district court to determine exactly what procedure would satisfy due process in these circumstances.

What process is due to protect plaintiffs' well-settled property interest in their Section 8 benefits is controlled by the factors set forth in *Mathews v. Eldridge* (see discussion below).[62]

E. Liberty Interests

Outside of a custodial setting, deprivation of liberty interests usually presents substantive, rather than procedural, due process issues. Such liberty interests were described in *Board of Regents v. Roth* as follows:

> *Without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men.*[63]

Life and freedom from physical restraint are the principal individual liberties that may not be abridged without due process.[64] Advocates should not neglect assertions of the liberty interest. For example, restrictive housing authority roommate policies that hamper the right to live with relatives can present a deprivation of a liberty interest.[65]

F. What Process is Due?

Due process does not require that procedures be so comprehensive as to preclude any possibility of error. Rather, due process requires a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.

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[62] 424 U.S. 319, 335 (1976).

[63] *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972) (*quoting Meyer v. Nebraska,* 262 U.S. 390, 399 (1923)). *See Zinermon v. Burch*, 494 U.S. 113, 117 (1990) (liberty interest in avoiding confinement in mental hospital).

[64] *Foucha v. Louisiana*, 504 U.S. 71 (1992).

[65] *Moore v. City of East Cleveland,* 431 U.S. 494, 503 (1977); *see also Wilkinson v. Austin*, 545 U.S. 209, 221-24 (2005) (inmates have a liberty interest in avoiding assignment to a "Supermax" facility).

Procedural due process generally requires that governmental deprivations of life, liberty or property be accompanied by **notice and hearing**. Pre-termination hearings are required where the threatened property right consists of need-based benefits. This is because the recipient or applicant "may be deprive[d] of the very means by which to live...."[66]

In *Mathews v. Eldridge*,[67] the Supreme Court formulated the test by which minimum procedural requirements, including the right to a pre-deprivation hearing, are determined:

> *[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of the safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.*[68]

- ***Examples***

In situations analogous to termination of Section 8 benefits as discussed above, the procedural protection guaranteed by the Constitution is typically pre-deprivation notice and a hearing. For example, see:

- *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 12-15, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978) (requiring notice of opportunity to be heard before disconnecting municipal utility service);
- *Mathews,* 424 U.S. at 339-40 (finding notice and administrative procedures used before discontinuing social security disability benefits constitutionally adequate);
- *Perry v. Sindermann,* 408 U.S. 593, 603 (1972) (requiring notice and an opportunity to be heard before terminating employment);
- *Bell v. Burson,* 402 U.S. 535 (1971) (requiring notice and an opportunity to be heard before a driver's license can be revoked);
- *Goldberg v. Kelly,* 397 U.S. 254, 264 (1970) (requiring notice and a hearing to discontinue welfare benefits).

Procedural due process continues to play a key role in legal services practice, as clients fail to receive notice of adverse government action or receive notices that fail to adequately explain the basis for a benefit denial, termination, suspension, or the

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[66] *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (Aid to Families with Dependent Children benefits); *Wheeler v. Montgomery*, 397 U.S. 280 (1970) (benefits under Aid to the Totally Disabled Program, the California precursor to the Supplemental Security Income program).
[67] 424 U.S. 319 (1976).
[68] *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

imposition of sanctions. Clients are often faced with hearing officers who fail to take evidence or gather evidence outside of a hearing through *ex parte* phone calls, or who do not adequately explain their reasoning when rendering a decision.

1. Factors considered

As the "interest" prongs of the *Mathews* test suggest, the amount of process due hinges first on the private interest at stake.

"The first step in the balancing process mandated by *Eldridge* is identification of the nature and weight of the private interest affected by the official action challenged." *Mackey v. Montrym*.[69]

The "second stage of the *Eldridge* inquiry requires consideration of the likelihood of an erroneous deprivation of the private interest involved as a consequence of the procedures used."[70]

The third leg of the *Eldridge* balancing test requires courts to identify the governmental function involved; also, to weigh in the balance the state interests served by the summary procedures used, as well as the administrative and fiscal burdens, if any, that would result from the substitute procedures sought.[71]

2. Elements of due process

In addition to notice and opportunity to be heard, standard elements of due process include (1) notice of the basis of the governmental action; (2) a neutral arbiter; (3) an opportunity to make an oral presentation; (4) a means of presenting evidence; (5) an opportunity to cross-examine witnesses or to respond to written evidence; (6) the right to be represented by counsel; and (7) a decision based on the record with a statement of reasons for the result. *Rogin v. Bensalem Township*, 616 F.2d 680, 694 (3d Cir. 1980); *see also, e.g.*, *United States ex rel. Negron v. State of New York*, 434 F.2d 386 (2d Cir. 1970) (due process right to translation of proceedings for non-English speakers; to non-English speaker a proceeding conducted without an interpreter is merely a "babble of voices.").

3. Application

Civil commitment. In *Addington v. Texas*, 441 U.S. 418 (1979), the Court considered the standard of proof required in a civil proceeding to commit an individual involuntarily. The Court held that "civil commitment for any purpose" must be supported by clear and convincing evidence of individual dangerousness. *Id*. at 425.

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[69] 443 U.S. 1, 11 (1979).
[70] *Id*. at 13.
[71] *Id*. at 17.

Civil forfeiture. Procedural due process applies where the government seeks to seize property allegedly subject to forfeiture (which most often occurs when the government claims that the property was connected to, or was the product of, criminal activity). Absent exceptional circumstances, the government must provide the owner of real property notice and an opportunity for some type of hearing prior to seizing real property.

Immigrant detainees. Non-citizens in the custody of immigration authorities have the right to procedural protections in relation to removal proceedings, which may include reasonable access to telephones while in detention in order to collect evidence to be presented in their defense. *See Lyon v. United States Immigration & Customs Enforcement*, 171 F. Supp. 3d 961 (N.D. Cal. 2016).

G. California Procedural Due Process Principles

California law is similar to federal law. Under state law, "liberty" includes freedom from arbitrary adjudicative procedures. Whether there is a right to a hearing and the timing and elements of the hearing are established by balancing four factors:

1. Private interest
2. Risk of error
3. Government interest
4. Dignitary interest in providing notice and hearing to the individual

> [T]he extent to which due process relief will be available depends on a careful and clearly articulated balancing of the interests at stake in each context. In some instances this balancing may counsel formal hearing procedures that include the rights of confrontation and cross-examination, as well as a limited right to an attorney. (*See, e.g., Morrissey v. Brewer, supra,* 408 U.S. 471; *In re Bye* (1974) 12 Cal. 3d 96 [115 Cal. Rptr. 382, 524 P.2d 854].) In others, due process may require only that the administrative agency comply with the statutory limitations on its authority. (*See, e.g., Cafeteria Workers v. McElroy, supra*, 367 U.S. 886.) **More specifically, identification of the dictates of due process generally requires consideration of (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail**. (*See Civil Service Assn. v. City*

and County of San Francisco (1978) 22 Cal. 3d 552, 561 [150 Cal. Rptr. 129, 586 P.2d 162].)[72]

- ***Examples:***

(A) The State Bar maintains a "client security fund" to compensate clients cheated by lawyers. Statute makes payments discretionary with the Bar and provides for no procedures. Held: Due process requires an informal hearing at which applicant can present information in support of his claim. It also requires written findings of fact.

> **The opportunity to be heard is 'a fundamental requirement of due process.'** (*Stanson v. San Diego Coast Regional Com*. (1980) 101 Cal. App. 3d 38, 45 [161 Cal. Rptr. 392]; *see Perry v. Sindermann, supra*, 408 U.S. at p. 603 [33 L. Ed. 2d at p. 580].) However, there is no precise manner of hearing which must be afforded; rather the particular interests at issue must be considered in determining what kind of hearing is appropriate. A formal hearing, with full rights of confrontation and cross-examination is not necessarily required. (*See People v. Ramirez, supra*, 25 Cal.3d at p. 275.) **What must be afforded is a 'reasonable' opportunity to be heard.** (*Anderson Nat. Bank v. Luckett*, 321 U.S. 233, 246 [88 L. Ed. 692, 704, 64 S. Ct. 599, 151 A.L.R. 824]; *Drummey v. State Bd. of Funeral Directors*, 13 Cal.2d 75, 80 [87 P.2d 848]; *CEEED v. California Coastal Zone Conservation Com*. [(1974) 43 Cal. App. 3d 306, 329 (118 Cal. Rptr. 315)].)[73]

(B) Decisionmakers must be impartial. Normally this requires a showing of actual rather than merely apparent bias. For example, the Pro Tem hearing officer in a farm labor case was not biased even though his law firm handles such cases.

> The right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him. As stated in *Evans v. Superior Court* (1930) *supra*, 107 Cal.App. 372, 380, the word bias refers 'to the mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved.' In an administrative context, Professor Davis has written that 'Bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification.' (2 Davis, Administrative Law Treatise (1st ed. 1958) p. 131; also see *United States v. Morgan* (1941) 313 U.S. 409, 420-421 [85 L.Ed. 1429, 1434-1435, 61 S.Ct. 999]; *Trade Comm'n. v. Cement Institute* (1948) 333 U.S. 683, 700-703 [92 L.Ed. 1010, 1034-1036, 68 S.Ct. 793].) This long established, practical rule is merely a recognition of the fact that anyone acting in a

[72] *People v. Ramirez*, 25 Cal 3d 260, 158 Cal. Rptr. 316 (1979).
[73] *Saleeby v. State Bar*, 39 Cal.3d 547, 216 Cal. Rptr 367 (1985).

> judicial role will have attitudes and preconceptions toward some of the legal and social issues that may come before him.[74]

Financial bias, even an appearance of bias, however, requires disqualification.[75]

Lower-level staff members, however, may not be an adversary and then function as a decisionmaker or an *ex parte* adviser to a decisionmaker.

> The protections of procedural due process apply to administrative proceedings (*Richardson v. Perales* (1971) 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842); the question is simply what process is due in a given circumstance. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484; *see Logan v. Zimmerman Brush Co*. (1982) 455 U.S. 422, 428-429, 102 S. Ct. 1148, 1153-1154, 71 L. Ed. 2d 265.) Due process, however, always requires a relatively level playing field, the so-called 'constitutional floor' of a 'fair trial in a fair tribunal,' in other words, a fair hearing before a neutral or unbiased decision maker. (*Bracy v. Gramley* (1997) 520 U.S. 899, 904-905, 117 S. Ct. 1793, 1797, 138 L. Ed. 2d 97; *Withrow v. Larkin* (1975) 421 U.S. 35, 46, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712 (Withrow).)
>
> …
>
> Just as in a judicial proceeding, due process in an administrative hearing also demands an appearance of fairness and the absence of even a probability of outside influence on the adjudication. In fact, the broad applicability of administrative hearings to the various rights and responsibilities of citizens and businesses, and the undeniable public interest in fair hearings in the administrative adjudication arena, militate in favor assuring that such hearings are fair. As one commentator recently noted, 'inescapably, administrative law and the administrative state impinge upon the public more and more often[.] When driver's licenses, house remodeling, vacations at the beach or the mountains, clean air and water, and cigarettes are all impacted by administrative regulations, the high likelihood is that . . . [the] administrative law judge . . . [is] going to be the person who is conducting that pivotal, first level of judicial review[.]' (Gillette, *Administrative Law Judges, Judicial Independence, and Judicial Review: Qui Custodiet Ipsos Custodes,* 20 J. Nat'l Ass'n Admin. L. Judges (2000) 95, 113, *as quoted by* Salkin, *Judging Ethics for Administrative Law Judges: Adoption of a Uniform Code of Judicial Conduct for the Administrative Judiciary*, 11 Widener J. Pub. L.7, 8, fn 3. (2002))[76]

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[74] *Andrews v. Agricultural Labor Relations Bd*., 28 Cal.3d 781 (1981).
[75] *Haas v. County of San Bernardino*, 27 Cal.4th 1017 (2002) (pro tem hearing officer hired from local law firm).
[76] *Nightlife Partners v. City of Beverly Hills*, 108 Cal. App. 4th 81, 133 Cal.Rptr.2d 234 (2002).

- ***Example – right to unbiased administrative officers in SSI Benefits:***

In *Verduzco v. Apfel*[77] the Ninth Circuit reiterated the requirement for an impartial decision-maker in a determination hearing for Supplemental Security Income benefits. Appellant claimant sought review of a judgment from the U.S. District Court for the Central District of California affirming a decision denying him supplemental security income disability benefits.

The court held that a Social Security claimant is entitled to procedural due process in the form of an **impartial decision-maker** who decides the case based on the legal rules and evidence adduced at the hearing and who states the reason for his determination and the evidence upon which he relied. **The court also determined there was no bias by the administrative law judge who originally heard the case.** The court concluded that administrative law judges were presumed to be unbiased, and that presumption could be **rebutted only by a showing of conflict of interest or some other specific reason for disqualification**, with the burden of making such a showing resting with the party asserting bias. Moreover, unlike federal judicial officers, ALJs are not held to the standard of avoiding the appearance of impropriety. [78] The court held appellant failed to meet his burden in overcoming the presumption.

IV. SUBSTANTIVE DUE PROCESS

In *Albright v. Oliver,* a plurality of the Supreme Court observed that "[t]he protection of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity."[79] The term "substantive due process" describes liberty-based due process challenges that seek certain outcomes, rather than additional procedures. In such cases, the Supreme Court recognizes a non-textual "liberty" which then limits or voids laws limiting that liberty.

The typical substantive due process claim brought under section 1983 seeks redress for government acts that violate "personal immunities" that are "fundamental," that is, "implicit in the concept of ordered liberty."[80]

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[77] 188 F.3d 1087, 1089-1090 (9th Cir. 1999)

[78] *See Bunnell v. Barnhart*, 336 F.3d 1112, 1114-1115 (9th Cir. 2003) (holding that plaintiff's counsel's having sued the ALJ in the past did not demonstrate actual bias when a motion to recuse had been denied). Thus, the Claimant must show actual bias on the part of the ALJ. (*See also Orellana v. Astrue*, 2008 U.S. Dist. LEXIS 10294, 26-27 (E.D. Cal. Feb. 12, 2008))

[79] *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (the Court held that substantive due process offered little support to a petitioner who claimed to have been arrested without probable cause, and that such a claim should be brought under the context of the Fourth Amendment).

[80] *See Rochin v. California*, 342 U.S. 165, 169-175 (1952), the prototypical "police brutality" case in which the violations were said to have "shock[ed] the conscience."

Courts have construed the due process clause and sometimes other clauses of the Constitution, as comprehending unenumerated rights that are "implicit in the concept of ordered liberty." However, what those rights are is not always clear. Rights protected at least in part by the Due Process Clause include liberty interests not explicitly set forth in the Constitution, such as the right to privacy –including the right to contraception, to live with family members, and the right to refuse medical treatment.[81]

Privacy is the quintessential unenumerated right protected under substantive due process principles. In *Griswold v. Connecticut*,[82] wherein the Court held that criminal prohibition of contraceptive devices for married couples violated federal, judicially enforceable privacy rights. The right to contraceptives was found in what the Court called the "penumbras", or shadowy edges, of certain amendments that arguably refer to certain privacy rights.

> We have had many controversies over these penumbral rights of "privacy and repose." *See, e.g., Breard v. Alexandria*, 341 U.S. 622, 626, 644; *Public Utilities Comm'n v. Pollak*, 343 U.S. 451; *Monroe v. Pape*, 365 U.S. 167; *Lanza v. New York*, 370 U.S. 139; *Frank v. Maryland*, 359 U.S. 360; *Skinner v. Oklahoma*, 316 U.S. 535, 541. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.[83]

The penumbra-based rationale of *Griswold* has since fallen into disuse. The Supreme Court instead uses the due process clause alone as a source of privacy protections. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (substantive due process right to engage in private consensual homosexual conduct).

Substantive due process review proceeds nearly identically to equal protection review. However, by deciding a case on substantive due process grounds, courts prevent an "end-run" around equal protection holding:

> The reason why the Court in *Lawrence* did not employ an equal protection analysis was itself protective. The Court stated that it would not sufficiently establish the right to intimate homosexual relations if only equal protection were invoked, because a state might frustrate the right by denying heterosexuals as well as homosexuals the right to non-marital sexual relations.[84]

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[81] *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972) (access to contraception); *Roe v. Wade,* 410 U.S. 113 (1973) (right to choose to have or not have an abortion); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (right to live with family members); and *Cruzan v. Director of Missouri Department of Health*, 497 U.S. 261 (1990) (right to refuse medical treatment).
[82] 381 U.S. 479 (1965).
[83] *Id.* at 484-85.
[84] *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. Wash. 2008) (Canby, J., concurring in part and dissenting in part).

A substantive due process claim can also be based on deprivations caused by the government's failure to train, supervise or adequately hire its employees. Such claims are very difficult to prove. They require a showing that the government's inaction was a custom, policy, or practice, and that the government's deliberate inaction caused the injuries. Since *City of Canton v. Harris*, involving failure to identify and adequately treat a prisoner's medical condition, the court has basically required a plaintiff to show that the type of incident which resulted in injury is so recurring as to tend to show that the government's inaction was conscious or deliberate, amounting to "deliberate indifference" to the consequences of its inaction.[85]

In *Armendariz v. Penman*[86], the complainants argued that they had been denied substantive due process by the action of a municipality in closing a number of low-income housing units following a series of housing code inspections. They contended that the "purpose of the sweeps was to force tenants with criminal records or suspected gang affiliations or both to relocate outside the City."[87] The Court of Appeals for the Ninth Circuit granted summary judgment for the defendants on the substantive due process claim, concluding that "[b]ecause explicit textual provisions of constitutional protection [the Fourth and Fifth Amendments] cover the areas of conduct challenged by the plaintiffs, substantive due process provides the plaintiffs no additional relief."[88]

- ***Example – General Assistance Relief and the Right to Privacy***

In *Robbins v. Superior Court*,[89] plaintiffs, who were single, employable low-income individuals eligible for general assistance benefits, challenged the Sacramento County's general assistance program which precluded eligible residents who are single and employable from receiving cash grants. Instead, the program offered them "in-kind" benefits -- food and shelter at a County-run facility.

Plaintiffs raised a substantive due process claim – arguing that the County's "in-kind" benefits program violates their constitutional right to privacy, under Article I, section 1 of the California Constitution.[90]

The Court reasoned:

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[85] *Connick v. Thompson*, 131 S. Ct. 1350, 1359-60 (2011); *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (failure to train police officers to identify medical emergencies). *See also Board of the County Commissioners v. Brown*, 520 U.S. 397 (1997) (liability for failure to hire competent personnel requires a showing of "deliberate indifference" to the consequences in light of the newly hired deputy sheriff's propensity for violence).
[86] 75 F.3d 1311 (9th Cir. 1996).
[87] *Id.* at 1314.
[88] *Id.* at 1328.
[89] 38 Cal. 3d 199 (Cal. 1985).
[90] Article I, section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

> "The right to privacy was added to the California Constitution by the voters in 1972. The ballot pamphlet, which was distributed to the voters prior to the election, stated that the constitutional right to privacy encompassed a variety of rights involving private choice in personal affairs. "The right to privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose . . . . [para.] . . . . The right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth, and Ninth Amendments to the U.S. Constitution. This right should be abridged only when there is compelling public need."
>
> [T]he right to privacy was held to encompass the right to choose the people with whom one lives…Plaintiffs argue persuasively that the County's "in-kind" benefits policy infringes upon their constitutional right to privacy. Residence at the Bannon Street facility compels the individual to give up his home and the ability to choose his associates. He is forced to live in a particular location without the freedom to choose his own living companions. Further, an acute loss of personal privacy is inevitable where residents sleep in dormitories, eat in a cafeteria, use the same bathrooms, and live according to institutionally prescribed rules of conduct.[91]

In finding for the plaintiffs, the Court applied a review of substantive due process that is nearly identical to the review of equal protection claims:

> When receipt of a public benefit is conditioned upon the waiver of a constitutional right, the "government bears a heavy burden of demonstrating the practical necessity for the limitation." (*Bagley* v. *Washington Township Hospital Dist*. (1966) 65 Cal.2d 499, 505) The governmental entity seeking to impose such a condition must establish that: (1) the condition reasonably relates to the purposes of the legislation which confers the benefit; (2) the value accruing to the public from imposition of the condition manifestly outweighs any resulting impairment of the constitutional right; and (3) there are no available alternative means that could maintain the integrity of the benefits program without severely restricting a constitutional right.[92]

V. EQUAL PROTECTION

Where a law treats certain classes of people differently than others, a potential equal protection claim arises. The doctrine regulates ability of government to classify individuals for purpose of receiving benefits or punishment. It requires that

[91] *Robbins,* 38 Cal. 3d at 212.
[92] *Id.* at 213.

classifications relate to proper governmental purpose and that similarly situated persons be similarly treated.

A. Fourteenth Amendment.

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."**

B. Fifth Amendment Equal Protection Guarantee

The Fifth Amendment has no Equal Protection Clause. An equal protection claim under the Fifth Amendment is brought under the equal protection component of the Due Process Clause. "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."[93]

C. Levels of Scrutiny

1. Rational basis scrutiny.

The equal protection standard that is applied to the majority of instances is known as the rational basis test. It requires only that a statute that treats similarly situated individuals differently be rationally related to a "legitimate" governmental interest. *Romer v. Evans*, 517 U.S. 620, 631 (1996):

> The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 271-272, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979); *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 64 L. Ed. 989, 40 S. Ct. 560 (1920). We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. *See, e. g., Heller*

[93] *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

v. Doe, 509 U.S. 312, 319-320, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993).
…

> [E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority. In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. *See New Orleans v. Dukes*, 427 U.S. 297, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976) (tourism benefits justified classification favoring pushcart vendors of certain longevity); *Williamson v. Lee Optical of Okla., Inc*., 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955) (assumed health concerns justified law favoring optometrists over opticians); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 93 L. Ed. 533, 69 S. Ct. 463 (1949) (potential traffic hazards justified exemption of vehicles advertising the owner's products from general advertising ban); *Kotch v. Board of River Port Pilot Comm'rs for Port of New Orleans*, 330 U.S. 552, 91 L. Ed. 1093, 67 S. Ct. 910 (1947) (licensing scheme that disfavored persons unrelated to current river boat pilots justified by possible efficiency and safety benefits of a closely knit pilotage system). The laws challenged in the cases just cited were narrow enough in scope and grounded in a sufficient factual context for us to ascertain some relation between the classification and the purpose it served. By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.[94]

The rational basis test is premised on the assumption that misguided laws will eventually be changed through the political process. *See, e.g., Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000); *Boivin v. Black*, 225 F.3d 36, 42 (1st Cir. 2000); *Zehner v. Trigg*, 133 F.3d 459, 463 (7th Cir. 1997). Under the rational basis test, the Court usually defers to the legislature.

Nevertheless, the Court has insisted that the rational basis test is not "toothless," *Matthews v. Lucas*, 427 U.S. 495, 510 (1976), and that it provides meaningful protection from the erratic and disparate treatment that are the hallmarks of invidious discrimination. The mere explication of a justification in the face of contrary evidence does not satisfy the rational-basis test.

[94] *Romer v. Evans*, 517 U.S. 620, 631-633 (1996).

> To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *See Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973). Furthermore, some objectives -- such as 'a bare . . . desire to harm a politically unpopular group,' id., at 534 -- are not legitimate state interests. See also *Zobel*, *supra*, at 63.[95]

In *Garberding v. INS,* 30 F.3d 1187, 1190-91 (9th Cir. 1994), the Ninth Circuit concluded that it was irrational to deport an immigrant because she did not qualify under state law for expungement of a conviction, even though she met all criteria for expungement under the Federal First Offender Act. 30 F.3d at 1191 ("distinguishing [plaintiff] for deportation because of the breadth of Montana's expungement statute, not because of what she did, has no logical relation to the fair administration of the immigration laws"). *See also Tapia-Acuna v. INS*, 640 F.2d 223, 224-25 (9th Cir. 1981) ("Like the Second Circuit, this court applies the rational basis test to federal immigration statutes distinguishing among groups of aliens."); *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993) (same).

The rational basis test requires only a rational relationship between the end (the legitimate governmental objective) and the means to that end (the statute whose constitutionality is at issue).

2. Intermediate Scrutiny.

The third equal protection test provides for an intermediate level of review falling between the rigorous strict scrutiny test and the lenient rational basis test. To pass muster under this intermediate test, a classification must bear a "substantial relationship" to an "important" governmental interest *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Application of this test is confined to a discrete number of classifications, generally those based on gender and illegitimacy. *Id*.

> In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amdt. 14, § 1, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973); *cf. Lyng v. Automobile Workers*, 485 U.S. 360, 370, 99 L. Ed. 2d 380, 108 S.

[95] *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-447 (1985).

> Ct. 1184 (1988). Classifications based on race or national origin*, e. g., Loving v. Virginia*, 388 U.S. 1, 11, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967), and classifications affecting fundamental rights, *e. g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 672, 16 L. Ed. 2d 169, 86 S. Ct. 1079 (1966), are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy. *See, e. g., Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-724, 73 L. Ed. 2d 1090, 102 S. Ct. 3331, and n. 9 (1982); *Mills v. Habluetzel*, 456 U.S. 91, 99, 71 L. Ed. 2d 770, 102 S. Ct. 1549 (1982); *Craig v. Boren*, 429 U.S. 190, 197, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976); *Mathews v. Lucas*, 427 U.S. 495, 505-506, 49 L. Ed. 2d 651, 96 S. Ct. 2755 (1976).
>
> To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective. Consequently we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because 'visiting this condemnation on the head of an infant is illogical and unjust.' *Weber v. Aetna Casualty & Surety Co*., 406 U.S. 164, 175, 31 L. Ed. 2d 768, 92 S. Ct. 1400 (1972). Yet, in the seminal case concerning the child's right to support, this Court acknowledged that it might be appropriate to treat illegitimate children differently in the support context because of 'lurking problems with respect to proof of paternity.' *Gomez v. Perez*, 409 U.S. 535, 538, 35 L. Ed. 2d 56, 93 S. Ct. 872 (1973).[96]

In *Plyler v. Doe*[97], the Supreme Court held that middle level scrutiny should be applied when a law discriminates against undocumented children by depriving them of an important interest, namely education.[98]

> [Every] citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. As one early commentator noted, given the historical emphasis on geographic territoriality, bounded only, if at all, by principles of sovereignty and allegiance, no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.[99]
>
> [A]ll persons within the territory of the United States, including aliens unlawfully present, may invoke the Fifth and Sixth Amendments to challenge actions of the Federal Government, we

[96] *Clark v. Jeter*, 486 U.S. 456, 461 (1988).
[97] 457 U.S. 202 (1982).
[98] *Id.* at 221.
[99] *Plyler v. Doe,* 457 U.S. 202, 211 n.10 (1982).

reasoned from the understanding that the Fourteenth Amendment was designed to afford its protection to all within the boundaries of a State. Our cases applying the Equal Protection Clause reflect the same territorial theme:

Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities, -- each responsible for its own laws establishing the rights and duties of persons within its borders.

There is simply no support for appellants' suggestion that 'due process' is somehow of greater stature than 'equal protection' and therefore available to a larger class of persons. To the contrary, each aspect of the Fourteenth Amendment reflects an elementary limitation on state power. To permit a State to employ the phrase 'within its jurisdiction' in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment. The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection.[100]

The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.' *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). But so too, '[the] Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.' *Tigner v. Texas*, 310 U.S. 141, 147 (1940). The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

[100] *Id*. at 212-213.

> But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.' With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.[101]
>
> These well-settled principles allow us to determine the proper level of deference to be afforded § 21.031. Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.' Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population. *See San Antonio Independent School Dist. v. Rodriguez*, supra, at 28-39. But more is involved in these cases than the abstract question whether § 21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.[102]

[101] *Id*. at 217-218.
[102] *Id.* at 224-225.

Though not a fundamental right, the Court found education sufficiently important to merit intermediate review. *Id*. at 221-224. Requirements are satisfied where no better available alternative exists.

3. Strict scrutiny:

Under the strict scrutiny test, a statute must be narrowly tailored to further a "compelling" governmental interest in order to survive. *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). Courts apply this test to statutes that place differing restrictions on persons based on a "suspect" criterion, such as race, as well as to those that burden the exercise of what are considered "fundamental rights." *Vacco v. Quill*, 521 U.S. 793, 799 (1997).

A "suspect" criterion is one that is so infrequently related to the realization of a legitimate governmental objective that its invocation as a reason for differential treatment is usually the mark of enmity and prejudice. *City of Cleburne v. Cleburne Living Ctr*., *supra*, 473 U.S. at 440. Race and national origin are classic examples of suspect criteria. *Id. See also Plyler v. Doe*, 457 U.S. 202, 218 n. 14 (1982) (strict scrutiny test applies to the differential treatment of groups that "have historically been `relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process'") (*quoting San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

Strict scrutiny is also applied to classifications that impinge on a fundamental right. The Supreme Court has recognized that the right to have access to the courts is a fundamental right. *Bounds v. Smith*, 430 U.S. 817, 828 (1977) ("[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.")

a. Fundamental Rights:

Where fundamental rights infringed, strict scrutiny is the test and the challenged law is generally struck down. For example:

(1) Right to Interstate Travel - *Shapiro v. Thompson*, 394 U.S. 618 (1969) (key because applied to the right to receive emergency health care)

> The right of interstate travel has repeatedly been recognized as a basic constitutional freedom. Whatever its ultimate scope, however, the right to travel was involved in only a limited sense in *Shapiro*. The Court was there concerned only with the right to migrate, "with intent to settle and abide" or, as the Court put it, "to migrate, resettle, find a new job, and start a new life." Id., at 629. Even a bona fide residence requirement would burden the right to travel, if travel meant merely movement. But, in Shapiro, the Court explained that "the residence requirement and the one-year waiting-period requirement are distinct and independent

prerequisites" for assistance and only the latter was held to be unconstitutional.

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Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much "a basic necessity of life" to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements. It would be odd, indeed, to find that the State of Arizona was required to afford Evaro welfare assistance to keep him from the discomfort of inadequate housing or the pangs of hunger but could deny him the medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness.[103]

2) Right To Vote –

A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature. As stated by the Court in *United States v. Bathgate*, 246 U.S. 220, 227 "[t]he right to vote is personal . . . ." While the result of a court decision in a state legislative apportionment controversy may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote. Like *Skinner v. Oklahoma*, 316 U.S. 535, such a case 'touches a sensitive and important area of human rights,' and 'involves one of the basic civil rights of man,' presenting questions of alleged 'invidious discriminations . . . against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.' 316 U.S., at 536, 541. Undoubtedly, the

[103] *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254-55 (U.S. 1974).

right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in *Yick Wo v. Hopkins*, 118 U.S. 356, the Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights.' 118 U.S., at 370.[104]

D. Equal Protection in California

1. Rational Basis

[T]he basic and conventional standard for reviewing economic and social welfare legislation in which there is a 'discrimination' or differentiation of treatment between classes or individuals. . . . [That standard] invests legislation involving such differentiated treatment with a presumption of constitutionality and 'requir[es] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose.'. . . [T]he burden of demonstrating the invalidity of a classification under this standard rests squarely upon the party who assails it." This first basic equal protection standard generally is referred to as the 'rational relationship' or 'rational basis' standard.[105]

2. Strict Scrutiny

[T]he second equal protection standard is "[a] more stringent test [that] is applied . . . in cases involving 'suspect classifications' or touching on 'fundamental interests.' Here the courts adopt 'an attitude of active and critical analysis, subjecting the classifications to strict scrutiny. . . . Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.' [Citation.]" This second standard generally is referred to as the 'strict scrutiny' standard.[106]

3. No Intermediate Scrutiny – Strict Scrutiny Applied.

As we noted in *Hernandez, supra*, 41 Cal.4th 279, 299, footnote 12: "In applying the federal equal protection clause, the United States Supreme Court has applied a third standard—'intermediate scrutiny'—'to discriminatory classifications based on sex or illegitimacy.' (Clark v. Jeter

[104] *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).
[105] *In re Marriage Cases*, 43 Cal. 4th 757, 832 (2008).
[106] *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 299.

> (1988) 486 U.S. 456, 461 [100 L. Ed. 2d 465, 108 S. Ct. 1910].)" Past California decisions, by contrast, have applied the strict scrutiny standard when evaluating discriminatory classifications based on sex (*see, e.g., Sail'er Inn, supra*, 5 Cal.3d 1, 15–20; *Arp v. Workers' Comp. Appeals Bd*. (1977) 19 Cal. 3d 395, 400 [138 Cal. Rptr. 293, 563 P.2d 849]; *Michael M. v. Superior Court* (1979) 25 Cal.3d 608, 610–611 [159 Cal. Rptr. 340, 601 P.2d 572]; *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 564 [10 Cal. Rptr. 3d 283, 85 P.3d 67]), and have not applied an intermediate scrutiny standard under equal protection principles in any case involving a suspect (or quasi-suspect) classification.[107]

E. Equal Protection and Government Benefits – Examples

1. Welfare Benefits

Saenz v. Roe, 526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999), struck down a California law that limited new residents to the amount of welfare benefits they would have received in the state of their prior residence. "[T]he state's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens." Citizens, regardless of their incomes, have the right to choose to be citizens of the state in which they reside. The states, however, "do not have any right to select their citizens."

2. Social Security

With the exception of gender distinctions and different treatment of children born outside of marriage, nearly all categories that lead to different benefit treatment have also been upheld against attack under the equal protection component of the Fifth Amendment's Due Process Clause.

In *Mathews v. Lucas*, 427 U.S. 495 (1976), the Supreme Court upheld the Act's provisions dealing with proof of dependency by children born outside marriage. The decision concludes that requiring proof of financial dependency of such children does not deny equal protection.

In *Jimenez v. Weinberger*, 417 U.S. 628 (1974), the Supreme Court struck down provisions of the Act which denied benefits to children born outside marriage whose dependency on a disabled worker did not arise until after the onset of disability. It found the differential treatment of non-marital children to be a denial of equal protection:

> Indeed, as we have noted, those illegitimates statutorily deemed dependent are entitled to benefits regardless of whether they were living in, or had ever lived in, a dependent family setting with their disabled parent. Even if

[107] *In re Marriage Cases*, *supra* fn. 55 (2008).

> children might rationally be classified on the basis of whether they are dependent upon their disabled parent, the Act's definition of these two subclasses of illegitimates is "overinclusive" in that it benefits some children who are legitimated, or entitled to inherit, or illegitimate solely because of a defect in the marriage of their parents, but who are not dependent on their disabled parent. Conversely, the Act is "underinclusive" in that it conclusively excludes some illegitimates in appellants' subclass who are, in fact, dependent upon their disabled parent. Thus, for all that is shown in this record, the two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment.[108]

3. Food Stamps

Rational Basis and Food Stamps: Discrimination against households containing unrelated persons in granting Food Stamps has been held irrational:

> Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. See *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972); *Richardson v. Belcher*, 404 U.S. 78, 81 (1971); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). The purposes of the Food Stamp Act were expressly set forth in the congressional "declaration of policy":
>
> "It is hereby declared to be the policy of Congress . . . to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households. The Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. The Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of our agricultural abundances and will strengthen our agricultural economy, as well as result in more orderly marketing and distribution of food. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to purchase a nutritionally adequate diet through normal channels of trade." 7 U. S. C. § 2011.
>
> The challenged statutory classification (households of related persons versus households containing one or more unrelated persons) is clearly irrelevant to the stated purposes of the Act. As the District Court

[108] *Id.* at 637.

> recognized, the relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do with their abilities to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements.
>
> … The legislative history that does exist, however, indicates that that amendment was intended to prevent so-called "hippies" and "hippie communes" from participating in the food stamp program. See H. R. Conf. Rep. No. 91-1793, p. 8; 116 Cong. Rec. 44439 (1970) (Sen. Holland). The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. As a result, "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment." …
>
> Thus, in practical operation, the 1971 amendment excludes from participation in the food stamp program, not those persons who are "likely to abuse the program" but, rather, only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility. Traditional equal protection analysis does not require that every classification be drawn with precise mathematical nicety. But the classification here in issue is not only imprecise, it is wholly without any rational basis. The judgment of the District Court holding the "unrelated person" provision invalid under the Due Process Clause of the Fifth Amendment is therefore affirmed.[109]

In *Lyng v. Int'l Union*,[110] several labor unions and union members brought suit in the U.S. District Court for the District of Columbia against the Secretary of Agriculture, in his official capacity as the official responsible for administration of the food stamp program. The plaintiffs challenged 109 of the Omnibus Budget Reconciliation Act of 1981 (7 USCS 2015(d)(3)), which provided that "a household in which any member is on strike because of a labor dispute other than a lockout (1) is ineligible to become a participant in the federal food stamp program and (2) is precluded from increasing its food stamp allotment, as a result of a decrease in the income of the striking member, if the household was eligible for food stamps prior to the strike."[111]

Plaintiffs argued that the provision violated, in several respects, the rights of the strikers and their household members under the equal protection component of the due process clause of the Fifth Amendment. The court rejected the claim and held that:

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[109] *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 533-534 (1973).
[110] 485 U.S. 360 (1988).
[111] *Id.*

> "Section 109 does not violate the equal protection component of the Fifth Amendment, since it is rationally related to the legitimate governmental objective of avoiding undue favoritism in private labor disputes. Although the statute does work at least some discrimination against strikers and their households, this Court must defer to Congress' view that the disbursement of food stamps to such persons damages the program's public integrity and thus endangers its legitimate goals. The fact that § 109 is harder on strikers than on "voluntary quitters" does not render it irrational, since the neutrality concern does not arise with respect to the latter persons. Congress' considered efforts to avoid favoritism are evidenced by § 109's provisos preserving prestrike eligibility and eligibility when a household member has refused to accept employment because of a strike or lockout. OBRA was also enacted for the legitimate purpose of protecting the Government's fiscal integrity by cutting expenditures, and, although this objective cannot be pursued by discriminating against individuals or groups, the Constitution does not permit this Court to disturb the judgment of Congress, the body having discretion as to how best to spend money to improve the general welfare, that passing § 109 along with its provisos was preferable to undertaking other budget cuts in the food stamp program. The contention that § 109 irrationally "strikes at the striker through his family" is without merit, since the food stamp program generally operates against the household of an ineligible person, and the fact that the Act determines benefits on a "household" rather than an individual basis is not constitutionally significant."[112]

4. Medical Assistance and Poverty

In *Storman v. Ca. Dep't of Health Servs.,*[113] plaintiff challenged the California Department of Health's implementation of Medicare Part D (effective in 2006), which resulted in the imposition of copayments for plaintiff's prescription drugs, causing plaintiff undue financial hardship. Plaintiff took ten prescription medications for his medical conditions. Plaintiff asserts the requirement of copayments unfairly discriminates against poor disabled persons in violation of the U.S. Constitution and Title II of the Americans with Disabilities Act. In a section 1983 claim, plaintiff contended that "poor disabled persons, eligible for benefits under both Medicare and Medicaid/MediCal, have been disproportionately and unconstitutionally impacted by the implementation of Medicare Part D's prescription drug coverage plan requiring nominal copayments." The plaintiff alleged that this was a violation of Fifth Amendment due process and equal protection rights. Plaintiff sought restitutionary or compensatory and punitive damages for the expenses incurred in securing his medications.

First, the court held that plaintiff "may not pursue his claims for restitution or compensatory and punitive damages" because "[s]overeign immunity protects the federal government from monetary damages awards."[114]

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[112] 485 U.S. 360 (U.S. 1988).
[113] 2007 U.S. Dist. LEXIS 17197 (E.D. Cal. Mar. 9, 2007).
[114] *Id.* at 13.

Regarding plaintiff's constitutional claims, the court held that "due process rights are not impinged simply because of limitations in governmental aid implicit in coverage that falls short of offering unrestricted access to all prescription drugs."[115]

The *Storman* court applied Judge England's reasoning in *Indep. Living Ctr. of S. Cal., Inc. v. Leavitt*, a case where plaintiff similarly challenged the constitutionality of Medicaid (or MediCal in California), a medical assistance program for categorically low-income persons which is administered by the states and funded in part through federal aid so long as each state's program complies with applicable Medicaid laws and regulations. The California Department of Health Services administers California's MediCal program. Plaintiffs contended that their due process rights as protected by the Fifth Amendment are violated by Medicare's requirement that dual eligibles (people eligible for both MediCal and Medicare) make nominal co-payments for needed prescriptions. Plaintiffs argued that requiring such payments is not only unjustifiable and in derogation of Fifth Amendment due process but also amounts to discrimination against the poor in violation of equal protection concerns also guaranteed by the Fifth Amendment.[116]

The court held:

> "It has long been held that the due process clauses of both the Fifth and Fourteenth Amendments are intended to prevent governmental abuse of power, and "generally confer no affirmative right to governmental aid". *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). Moreover, with respect to equal protection, the constitutionality of the co-payment provision must be judged under a rational basis standard, since poverty alone is not a suspect classification demanding strict scrutiny. *See Harris v. McRae*, 448 U.S. 297, 323 (1980). Consequently the government need only show a rational relationship between its requirement of co-payments and a legitimate governmental purpose. *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001).
>
> Here, the government can show a rational relationship between allocating limited aid dollars and fostering investment by dual eligibles in the efficiency of their own medical care through demanding small co-payments as a demonstration of accountability."[117]

5. Housing

The Fair Employment and Housing Act (FEHA) outlaws discrimination in housing based on race, color, religion, national origin, and sex. A plaintiff can win an FEHA claim using a disparate impact theory by showing that the defendant's actions had

[115] *Id.* (citing *Indep. Living Ctr. of S. Cal., Inc. v. Leavitt*, 2006 U.S. Dist. LEXIS 31702 (E.D. Cal. May 19, 2006)).
[116] *Indep. Living Ctr. of S. Cal., Inc.,* 2006 U.S. Dist. LEXIS 31702 at 22-23.
[117] *Id.* at 24.

a disproportionately adverse impact on a protected class. Government voucher recipients are not a protected class under the FHA, so a claim cannot proceed under a theory of discrimination against voucher holders. But, plaintiffs in these cases argue that a landlord's withdrawal from the program has a disproportionate impact on minorities or the disabled, which are protected classes.

In *Town of Huntington v. Huntington Branch, NAACP*[118], the Supreme Court examined a zoning ordinance that violated the FEHA.

Huntington, New York, was a segregated town with the majority of the town's African American population living in one secluded area. The town's zoning code prohibited multifamily homes except in areas mainly populated by minorities. A private developer sought to amend the code and build multifamily, subsidized housing units in a white part of town. Racial minorities would constitute the majority of people eligible to live in the subsidized housing. The town rejected the request to amend the code. The developer filed suit claiming that the town violated the FHA by refusing to change the zoning code. Since mainly minorities were eligible to live in the subsidized housing, if the town did not amend the code, a protected class would be disproportionately adversely affected. Thus, the plaintiffs argued that the court should use a disparate impact standard in considering their claim.

The court held that because minorities constituted the majority of citizens eligible to live in subsidized housing, the town's refusal to amend the code disproportionately impacted a protected class. After plaintiffs proved disparate impact, the burden shifted to the town to provide a legitimate reason for refusing to amend the code. The town argued that it refused to allow subsidized housing in the "white" part of town because it wanted to encourage developers to build in the "deteriorated and needy section of town." Both the Court of Appeals and the U.S. Supreme Court found that justification inadequate and found the town had violated the FHA.

More recently in *Sabi v. Sterling,*[119] the court rejected a plaintiff's equal protection claim that was based on discrimination by a landlord based on a tenant's source of income. The court held that Section 8 assistance payments are not considered a source of income under FEHA. Additionally, the court held that a landlord can refuse to participate in the Section 8 program because nothing in the legislative history of the program indicated that it was enacted to compel landlords to participate in the program.

Plaintiff Elisheba Sabi ("Sabi") suffered from several physical and psychological disabilities. In 1998, Sabi and her husband applied to the Housing Authority of the City of Santa Monica ("Authority") for Section 8 assistance. Section 8 assistance payments are made under a federal program to aid low-income families in obtaining adequate housing. Authority notified Sabi and her husband they were eligible for assistance and Authority issued the couple a voucher in July 2003.

[118] 488 U.S. 15, 17 (1988).
[119] 183 Cal. App. 4th 916 (2010).

However, Sabi's landlord rejected her request to accept Section 8 assistance payments and refused to participate in the Section 8 program. Despite Landlord's repeated rejection of Sabi's request to participate in the program, Sabi and her family concluded that it would be best if she continued to live in the apartment she rented from Landlord. Sabi continued to pay rent at her apartment and Landlord had not asked her to vacate the apartment.

Sabi brought a lawsuit asserting Landlord discriminated against her in violation of the FEHA and the Unruh Act because of her disabilities, her source of income, and her status as a recipient of Section 8 housing. After the trial court dismissed most of Sabi's causes of action, a jury found Landlord had not violated the FEHA.

The court rejected Sabi's claim that Section 8 payments constitute a source of income under the FEHA. The court found that such "vouchers are not income under any definition of income." The court further found "Section 8 assistance payments to the landlord are not payments to a representative of a tenant" and are not included in a tenant's income. [120]

6. Aid to Families with Dependent Children

In *Sullivan v. Stroop*, parents receiving Aid to Families with Dependant Children (AFDC) benefits, filed suit challenging the Secretary's refusal to "disregard," under 42 U.S.C.S. § 602(a)(8)(A)(vi), the first $50 of Title II Social Security child's insurance benefits paid on behalf of children who were members of families applying for AFDC benefits. The statute provided for the disregard of the first $50 of "child support."

The Court applied rational basis review and held that Congress' desire to encourage the making of child support payments by absent parents affords a rational basis for applying the "disregard" provision of 42 USCS 602(a)(8)(A)(vi)--pursuant to which a state agency participating in the Aid to Families With Dependent Children (AFDC) program must disregard the first $ 50 of any "child support" payments in determining a family's eligibility for AFDC benefits in the month such payments are received--to payments from absent parents, but not to "child's insurance benefits" payments funded by the Federal Government under Title II of the Social Security Act (42 USCS 401 et seq.), so that the statutory distinction between the two types of payments does not violate the equal protection component of the due process clause of the Federal Constitution's Fifth Amendment.[121]

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[120] *Sabi*, 183 Cal. App. 4th at 934.
[121] 496 U.S. 478 (U.S. 1990).