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Special Focus:
The Incorporation Doctrine

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AP United States Government and Politics

Special Focus: The Incorporation Doctrine

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Editor's Introduction

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In important ways, the Civil War settled key unresolved issues that had existed since American independence. While the “peculiar institution” of slavery died along with (at least) 618,000 men on both sides of this great conflict, new and remarkable changes emerged from the ashes and gore. The most important of these was the Fourteenth Amendment to the U.S. Constitution.

The four authors in the materials that follow have attempted to convey the momentous changes this amendment brought to the subsequent political development of the United States. Dr. Wesley Phelan explains the how the Supreme Court has used the Fourteenth Amendment to gradually—and selectively—incorporate the protections afforded by the Bill of Rights to actions by state and local governments. Dr. Sean Matheson explains how two of the amendment’s critical clauses, the Due Process Clause and the Equal Protection Clause, have affected state and local governments and our rights when dealing with them. Andrew Conneen underscores the critical role of the courts in interpreting and applying the amendment, and offers a wide range of resources to help students understand the judiciary and judicial review. Finally, Matt Moore provides a broad summary of the Fourteenth Amendment along with insightful teaching techniques for conveying the importance and history-altering nature of the amendment. We hope you will find these pieces useful in preparing your AP® U.S. Government and Politics students on this important and challenging topic.

Historical Overview: The Fourteenth Amendment and the Selective Incorporation of the Bill of Rights

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Introduction

The U.S. Constitution, as it emerged from the Constitutional Convention in the summer of 1787, created a new system of government that was uniquely American at the time. It created a federal national government, with specific or enumerated powers, and state governments that retained the powers they had not delegated to the central government. The wording of the Bill of Rights, the first 10 amendments to the Constitution, prevented those rights from being applied to the states. Only the passage of the Fourteenth Amendment created a formal framework for extending certain aspects of the Bill of Rights to apply to the states, eventually applied in an unfolding legal doctrine known as selective incorporation. With selective incorporation, the Supreme Court decided, on a case-by-case basis, which provisions of the Bill of Rights it wished to apply to the states through the due process clause. This doctrine has profoundly influenced the character of American federalism.

The Framework: The Constitutional Convention and the Bill of Rights

The delegates who met at the Constitutional Convention in Philadelphia in the summer of 1787 were sent with instructions from their state legislatures to amend the Articles of Confederation. The Articles had established a confederal system of government in which sovereignty rested with the several states. The central government under the Articles consisted of the Continental Congress, a weak legislative body that a growing number of Americans believed was incapable of governing the nation.

A few days into the convention, Virginia governor Edmund Randolph introduced James Madison's plan for a new form of government. This new government would be much more powerful than the Continental Congress, but it would not be a unitary government that swept away the states. Instead it would create a federal system. Madison wrote of the new federal government that "its jurisdiction extends to certain enumerated objects only, and leaves to the states a residuary and inviolable sovereignty over all other objects."¹

One of the most important questions at the convention was which powers the states would surrender to the new government. The delegates did not think it necessary to attach a bill of rights to the Constitution, because the federal government was understood to have only the powers granted to it by the states. A bill of rights, specifying which powers the government would not have, was seen as superfluous. So the Constitution, as it came out of the convention and was sent to the states for ratification, contained no bill of rights.

During the ratification debates that followed in each of the states, opponents of the Constitution repeatedly criticized the document because it contained no bill of rights. The state constitutions had bills of rights, and the memory of British violations of basic liberties was fresh in the minds of many. Several state ratifying conventions called for the addition of a bill of rights to the document, and some ratified on the condition that one be added.²

Madison promised at the Virginia ratifying convention that he would work to have a bill of rights added if the Constitution was adopted. True to his word, he introduced a list of amendments in the first session of the House of Representatives, in June of 1789. The House and Senate pared Madison's list down to 12 amendments, formally proposed them by the necessary two-thirds vote, and sent them out to the states for ratification. The states approved 10 of the amendments, which were added to the Constitution as our Bill of Rights.

The Bill of Rights, as originally proposed by Congress and ratified by the states, applied only to the federal government. The delegates to the state ratifying conventions had called for a bill of rights because they wished to put limitations on the powers of the new federal government, not because they wanted to limit the powers of their respective state governments. Even so, Madison included in his list of amendments one that said, "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."³ Congress chose not to include this limitation on state power in the amendments it officially proposed and sent to the states for ratification. The only institution referred to by name in the Bill of Rights is the federal Congress. The First Amendment begins with the phrase, "Congress shall make no law." Clearly, the limitations on power applied only to the federal government, not to the states.

Judicial Interpretations Before the Civil War

In *Barron v. Baltimore* (1833), the Supreme Court was called upon for the first time to interpret whether the Bill of Rights could be seen as limiting state powers. Chief Justice John Marshall, a former member of the Federalist Party and opponent of the doctrine of states' rights, wrote the opinion in the case. The plaintiff in the case wanted the Court to apply the just compensation clause of the Fifth Amendment to the city of Baltimore. The question presented by the case, Marshall said, was of great importance but not of much difficulty. He continued:

The Constitution was ordained and established by the people of the United States for themselves, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the power of its particular government as its judgment dictated.⁴

Barron argued that the Constitution placed restrictions on both the federal and the state governments. In support of his argument, Barron noted the restrictions on state powers specified in Article I, Section 10. Marshall replied that had the framers of the Bill of Rights intended for them to apply to the states, they would have imitated those who wrote the Constitution, by expressing that intention. Marshall also observed that the call for

amendments that emanated from the state ratifying conventions was motivated by fear of federal power, not fear of state power. In light of the unambiguous historical record, the Supreme Court had no authority to apply the Bill of Rights to the states. The Court's decision in *Barron v. Baltimore* remained unchallenged until after the Fourteenth Amendment was added to the Constitution in 1868.

The Fourteenth Amendment and the Privileges and Immunities Clause

The Fourteenth Amendment was proposed by Congress to protect the rights of recently freed slaves, to overturn the three-fifths clause of the Constitution (in which slave populations were counted as three-fifths of free populations for purposes of congressional apportionment), to forbid southern insurrectionists from holding federal office, and to repudiate southern state debts incurred during the Civil War. The first section of the amendment creates a national citizenship and contains three clauses that limit the power of state governments to interfere with the rights of U.S. citizens. These clauses are known as the privilege and immunities clause, the due process clause, and the equal protection clause.

The Court had its first opportunity to use the Fourteenth Amendment to limit state power in the *Slaughterhouse Cases* of 1873.⁵ The cases arose from a Louisiana law granting an exclusive franchise to one large slaughterhouse to process all meat in and around the city of New Orleans. This was done to control the dumping of refuse into the Mississippi River, which was polluting the water and causing outbreaks of cholera in the city. The Court was asked to interpret the privileges and immunities clause as establishing a national right to practice one's occupation free of state-created monopoly.

In its decision, the Court refused this interpretation of the clause, finding that the claimed right did not exist before the passage of the amendment and was not deducible from the clause itself. Instead, the Court read the clause to mean that citizens of a state may freely travel to and establish residence in another state, and are entitled to the same privileges and immunities under state law as the citizens of the state to which they travel. This decision has been characterized as “virtually emasculating the privileges and immunities clause,” spelling “the demise of the [clause] as an effective guarantor of federal liberties at the state level.”⁶

Due Process and Different Doctrines of Incorporation

The Court's decision in the *Slaughterhouse Cases* thus eliminated the privileges and immunities clause as a vehicle for applying the Bill of Rights to the states. After an interval of many years, similar attempts under the Fourteenth Amendment would begin to bear legal fruit. The avenue this time would be the due process clause, which prohibits a state from depriving any person of life, liberty, or property without due process of law.

In 1925, the case of *Gitlow v. New York* came to the Supreme Court. Benjamin Gitlow had been convicted by the state of New York for advocating the overthrow of the government

by force. Gitlow challenged the state statute on the grounds that it violated the due process clause of the Fourteenth Amendment. In *Gitlow v. New York* a majority of the Supreme Court, for the first time, accepted the argument that provisions of the Bill of Rights apply to state governments. The Court said freedom of speech and of the press “are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states.”⁷ The Court did not explain how it came to interpret the due process clause in this manner, nor did it say what other rights and liberties it thought were fundamental enough to enjoy protection from state infringement. The Court left these matters to be decided later, as other cases brought different issues to the fore.

Not surprisingly, different justices came to see those issues differently. Some thought the word “liberty” in the due process clause was shorthand for the Bill of Rights. They became advocates of the position known as “total incorporation,” which held that the due process clause embodied or incorporated the entire Bill of Rights. This meant that the due process clause imposed the same restrictions on state power as the Bill of Rights did on federal power.

While total incorporation had the virtue of simplicity, it had some difficulties as well. For example, it meant imposing on state court systems the requirement to have a trial by jury in civil suits where the amount in dispute exceeded 20 dollars.⁸ In addition, applying the Tenth Amendment (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved for the States respectively, or to the people”) to the states seems illogical.

For these and other reasons a majority of justices finally accepted what is known as “selective incorporation.” With selective incorporation, the Supreme Court decided, on a case-by-case basis, which provisions of the Bill of Rights it wished to apply to the states through the due process clause. The key case for selective incorporation is *Palko v. Connecticut* (1937), in which the Court did two things: it specifically rejected total incorporation, and it established the standard to guide the process of selective incorporation. The Court said any right “found to be implicit in the concept of ordered liberty” and “so rooted in the traditions and conscience of our people as to be ranked as fundamental” would be applied to the states.⁹

In the 35 years following *Palko*, the Court heard a variety of cases through which it incorporated more of the Bill of Rights into the due process clause of the Fourteenth Amendment. (A list of important cases, and the provision of the Bill of Rights each incorporated, appears at the end of this article.) During these years the Court incorporated all of the First, Fourth, and Sixth Amendments, and all of the Fifth, except the right to indictment by grand jury. The Second, Third, Seventh, and Tenth Amendments were not incorporated, nor were the restrictions on excessive fines and bail from the Eighth. The status of the Ninth Amendment at present is difficult to ascertain.

The Warren Court and the Heyday of Selective Incorporation

In 1953, President Eisenhower nominated Earl Warren to be chief justice of the Supreme Court. Warren's term, which lasted until 1969, was one of the most important in the history of the Court. The Warren Court handed down several landmark cases that almost completely incorporated the first eight amendments into the due process clause of the Fourteenth Amendment.

In *Engel v. Vitale* (1962), the Court declared that state-sponsored prayer in public schools violates the establishment of religion clause of the First Amendment. The case effectively ended prayer in public schools that was written or led by school officials. A year later, in *Abington School District v. Schempp* (1963), the Court ruled that officially sanctioned Bible reading in public schools violates the establishment clause. These cases began the process of disentangling state governments from religious activities and laid the foundation for the "Lemon Test" articulated by the Court in 1971.¹⁰

The Warren Court also affected a revolution in criminal procedure at the state level. The Court expanded the rights of suspects under the Fourth, Fifth, and Sixth Amendments, and applied those rights to the states. *Mapp v. Ohio* (1961) applied the "exclusionary rule" to the states, preventing illegally obtained evidence from being admitted at trial. In *Gideon v. Wainwright* (1963), the Court ordered states to provide counsel, at state expense, to indigent defendants in felony cases. This ruling forced states to retry or release thousands of inmates in state custody who had been convicted without benefit of counsel. *Miranda v. Arizona* (1966), arguably the most sweeping of the Warren Court decisions, held that the police must notify suspects of their rights before interrogation. Writing for the Court in *Miranda*, Warren stated:

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that [he] has the right to remain silent . . . that anything said can and will be used against the individual in court . . . that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . [and] that if he is indigent, a lawyer will be appointed to represent him.¹¹

Mapp, *Gideon*, and *Miranda* are the most famous of the Warren Court's cases concerning criminal procedure, but they barely scratch the surface of the Court's activity in this area. Between 1961 and 1969 the Court incorporated 11 provisions of the Fourth, Fifth, and Sixth amendments. *Benton v. Maryland* (1969), decided on the last day of Warren's tenure on the Court, incorporated the protection against double jeopardy. In the years after Chief Justice Warren's retirement, the Court has incorporated only one other provision of the Bill of Rights.¹²

Conclusion

Selective incorporation has profoundly altered American federalism. Before the process started the federal courts had little to say about the day-to-day operation of state and local governments. Those governments regulated speech and the press; handled criminal

investigations, prosecutions, and punishments; and for a time even had official, established churches, all without interference from federal agents or courts. That time has long since passed.

With the incorporation of the freedom of speech and the press came federal guidelines for states and localities concerning what type of expression must be allowed in books, magazines, and movies. The federal courts tell states what sort of antiobscenity and anti-pornography laws they may pass and enforce, and what sorts of marches, rallies, and protests they must allow in public places. Whether the Chicago suburb of Skokie must allow Nazis to march through its Jewish neighborhoods—or a city in Florida may prevent the sale of albums by 2 Live Crew—is now a question involving the Supreme Court's interpretation of the First Amendment.

The incorporation of the Fourth, Fifth, and Sixth Amendments has changed the way state and local authorities enforce criminal law. Law enforcement officials must now pay particular attention to the way in which they interrogate suspects and must stop interrogations upon request, until a suspect has a lawyer present. Courts must appoint counsel for any indigent accused of a crime that carries a jail sentence, and judges must not allow evidence to be introduced at trial that was obtained in violation of the rights of the accused.

The incorporation of these and other rights has made criminal justice systems fairer for the accused and more uniform from state to state. The nationalization of these rights has helped us achieve a fuller realization of the promises contained in the Preamble to the Constitution, that the American people might establish justice and form a more perfect Union.

The Text of the Fourteenth Amendment

(Approved by Congress on June 13, 1866; ratified on July 9, 1868)

Section 1. 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.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis

of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Table 1: Major Cases Affecting the Doctrine of Selective Incorporation

Case	Year	Provision	Amendment
<i>Gitlow v. New York</i>	1925	Freedom of speech	First
<i>Near v. Minnesota</i>	1931	Freedom of the press	First
<i>Powell v. Alabama</i>	1932	Right to counsel in capital cases	Sixth
<i>De Jonge v. Oregon</i>	1937	Freedom of assembly, right to petition	First
<i>Cantwell v. Connecticut</i>	1940	Free exercise of religion	First
<i>Everson v. Board of Education</i>	1947	No establishment of religion	First
<i>In re Oliver</i>	1948	Right to public trial	Sixth
<i>Wolf v. Colorado</i>	1949	Right against unreasonable search and seizure	Fourth
<i>Mapp v. Ohio</i>	1961	Exclusionary rule	Fourth (and Fifth)
<i>Robinson v. California</i>	1962	Right against cruel and unusual punishment	Eighth
<i>Gideon v. Wainwright</i>	1963	Right to counsel in felony cases	Sixth

Case	Year	Provision	Amendment
<i>Malloy v. Hogan</i>	1964	Right against self-incrimination	Fifth
<i>Pointer v. Texas</i>	1965	Right to confront witnesses	Sixth
<i>Griswold v. Connecticut</i>	1969	Privacy	First, Third, Fourth, Fifth, Sixth, and Ninth
<i>Parker v. Gladden</i>	1966	Right to impartial jury	Sixth
<i>Klopfert v. North Carolina</i>	1967	Right to speedy trial	Sixth
<i>Washington v. Texas</i>	1967	Right to compulsory process	Sixth
<i>Duncan v. Louisiana</i>	1968	Right to jury trial in cases involving serious crime	Sixth
<i>Benton v. Maryland</i>	1969	Right against double jeopardy	Fifth
<i>Argersinger v. Hamlin</i>	1972	Right to counsel in any criminal case with potential sentence of incarceration	Sixth

Notes

1. *Federalist* 39.
2. www.archives.gov/national-archives-experience/charters/bill_of_rights.html
3. www.churchstatelaw.com/historicalmaterials/8_4_2.asp
4. The full name of the case is *Barron v. The Mayor and City Council of Baltimore*, 1833. U.S. (7 Pet.) 243, 8 L.Ed. 672.
5. The full name of the lead case is *Butchers' Benevolent Association v. Crescent City Livestock Landing & Slaughterhouse Co.* 83 U.S. (16 Wall) 36, 21 L. Ed. 394.
6. Craig R. Ducat, *Constitutional Interpretation*, 8th ed. (Belmont, Calif.: Thomson West, 2004).
7. *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L. Ed. 1138.
8. While \$20 might have been a sizeable amount of money in 1791, when the Seventh Amendment was ratified, by the 1900s it was not. Applying the amendment to the states would have required juries in even small claims cases, hopelessly clogging the state court systems.
9. *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288.
10. This test is named for the Court's decision in *Lemon v. Kurtzman* (1971), in which the Court established a test for determining whether state actions violate the establishment clause. The test is threefold. The statute: 1) must have a clear secular purpose; 2) must neither advance nor inhibit religion; and 3) must not foster an excessive government entanglement with religion.
11. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d. 694.
12. In *Argersinger v. Hamlin* (1972) the Court completed the process of selective incorporation by incorporating the right to counsel in all criminal cases entailing a jail term.

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

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Introduction

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

Due Process: Substantive and Procedural

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

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

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

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

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

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

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

Critical Questions on Due Process for Classroom Discussion

1. While many states and school districts have banned corporal punishment, the Supreme Court did not require the same procedural due process requirements for corporal punishment as it did to suspensions and expulsions. What disciplinary actions should schools be allowed to impose on students without providing procedural due process to the student? What elements of due process should students always be entitled to? How would these procedural protections affect school order?
2. How fair or effective are the due process rights defendants receive today? Is it enough that defendants be provided with a free attorney if they cannot afford one, or do they have a right to expect the same quality of legal representation that persons who can afford the best attorneys receive? Should taxpayers pay the defendant’s costs for tools such as DNA testing, psychological or psychiatric evaluation, or expert witnesses?

3. The Death Penalty Information Center calculates that for the last decade (1993-2003) the average time a person convicted of a capital offense spends on death row before being executed has stayed consistent: between 10 and 12 years.⁴ Most of this time is spent on appeals from the condemned person. Additionally, persons convicted of noncapital crimes can also file appeals and lawsuits while incarcerated. How much procedural due process should defendants or convicts be granted? Do they surrender all due process rights upon conviction, or should they receive as many procedural protections as possible? What protections or elements of due process should they be guaranteed? How much do these various protections cost?

The Equal Protection Clause and Strict Scrutiny

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

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

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

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

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

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

Intermediate Scrutiny and Legitimate State Purposes

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

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

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

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

The Equal Protection Clause and Court Decisions

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

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

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

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

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

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

Critical Questions on Equal Protection for Classroom Discussion

1. What are some compelling reasons to treat people differently because of their race or ancestry? Note that students should look in a dictionary or law text to understand what the term “compelling” means.
2. In creating an intermediate standard for gender-based laws, the Supreme Court has essentially argued there are sometimes good reasons for treating men and women differently. What are some of the reasons to treat men and women differently? This could be an opportunity to explore, compare, and contrast biological and social theories explaining gender differences. Students could also explore cross-cultural differences in male and female roles, or examine laws from various countries that treat men and women differently.

Student Activities

1. In 2003 the Supreme Court upheld a University of Michigan Law School affirmative action plan for admissions, but struck down the University of Michigan's undergraduate admissions plan. It held that the law school's policy that used race as one of many admissions criteria passed constitutional muster, but the undergraduate admissions policy made race the principal deciding factor, and was hence unconstitutional. Have students access, read, and compare and contrast the two decisions concerning one university. The cases are, respectively, *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

2. The fears and pressures of World War II certainly influenced the Supreme Court's decision in *Korematsu*. Have students discuss what restrictions would be appropriate or constitutional for Muslim Americans after September 11. Showing the 1998 movie *The Siege*, in which the government detains Muslim Americans after a series of bombings in New York City, may help launch the discussion.
3. To emphasize the important point that the equal protection clause does not mean people must be treated equally, have students look at federal or state laws in order to identify how people are treated differently. For instance, persons convicted of a crime are incarcerated or fined, but people who have not been convicted of a crime are not so punished. Some professions involve mandatory state licensure (doctors, lawyers, barbers) but some do not. Ask students to identify the legitimate state function served by treating these groups or persons differently, and if the different treatment is a rational means to that end. Be sure to note that rational does not mean "best" or "ideal."

Notes

1. Importantly, the Fourteenth Amendment applies only to state governments (and by extension, local governments or organs of the state governments such as state-funded universities). The federal government is required to provide due process by the Fifth Amendment's due process clause.
2. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), cited in *The American Constitution: Cases, Comments, Questions*, 8th. Ed. William B. Lockhart, et. al. St. Paul, MN: West Publishing, 1996, p. 605.
3. Lockhart et al., p. 605
4. "Time on Death Row." Death Penalty Information Center. Available at: <http://www.deathpenaltyinfo.org/article.php?&did=1397>. Last accessed January 20, 2007.
5. *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).
6. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed.2d. 437 (1981).
7. *Rostker v. Goldberg*, 453 U.S. 57, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981)
8. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982)
9. *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)
10. An example of this strategy reached the Supreme Court in 2006. The Louisville, Kentucky school district divides its 87 elementary schools into twelve "clusters" of between five to ten schools each. A family is able to attend the school in whose attendance boundaries they reside. However, a family may also apply to attend a different school within their "cluster," or apply to a magnet school or program. Admission to these schools is based on available space and on maintaining a minority population of no less than 15 percent and no more than 50 percent. Admission to one of the magnet programs also requires meeting the specific admission requirements for that magnet school's program. In 2004 a parent whose child was initially denied her first choice of school because of the racial integration requirement filed suit against the school district, and in November 2006 the U.S. Supreme Court heard oral arguments in the case. A decision on the Louisville school assignment plan was expected in May 2007. See Brief for Respondents, *Meredith v. Jefferson County Board of Education*, No 05-915, available at http://www.naacpldf.org/content/pdf/voluntary/parties_briefs/Louisville_Merits_Brief_05-915.pdf, accessed December 19, 2006.

Teaching About the Supreme Court and Selective Incorporation

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Introduction

The U.S. Supreme Court is the final arbiter of justice in America. The activities below will further acquaint and enhance your students' understanding of this important body. The first focuses specifically on selective incorporation; other activities explore the Court and its role in the American government system more generally. Finally, a set of questions and key terms will help students as they review the end of your unit on the judiciary.

Selective incorporation is the means by which the Supreme Court has, over time, applied most of the guarantees of the Bill of Rights to all citizens through an interpretation of the Fourteenth Amendment's due process clause. The Bill of Rights, when ratified in 1791, applied only to the powers of the national government and did not apply to the states. The first five words of the First Amendment say it all: "Congress shall make no law..."

Because of this, civil liberties were protected to different degrees from state to state. While this was federalism in action, it resulted in a system where some inalienable rights were unenforced or disregarded in some states. These were the same rights and liberties that, when defended, forged the Union. As states were allowed to violate these rights, many asked if the Republic had been founded on false pretenses.

With the passage of the Fourteenth Amendment in 1868, a new era of civil liberty was born. Section 1 states: "No state shall make or enforce any law which shall abridge the *privileges or immunities* of citizens... nor deprive any person... without *due process of law*... nor deny... the *equal protection of the laws*." (Emphasis added.) Soon thereafter, the Supreme Court began exploring the reach of such words. It was argued in the Slaughterhouse Cases (1873) that certain privileges and immunities "belong of right to the citizens of all free governments." These were the first, very limited steps toward applying the Fourteenth Amendment to state laws.

It was not until 1925, in *Gitlow v. New York*, when, for the first time, a Supreme Court majority ruled that a specific provision found in the Bill of Rights was a "privilege or immunity" to which all U.S. citizens were entitled, and no state could thus deprive. In *Gitlow* the Court used the language of the Fourteenth Amendment to "incorporate" the free speech clause of the First Amendment. Thus, the Supreme Court, not local or state governments, became the guarantor of basic civil liberties.

Student Activity: Selective Incorporation

Analyze a U.S. Supreme Court case decision that involved the principle of “selective incorporation.” Use an online resource to select a case in which the U.S. Supreme Court makes a state or local government adhere to the First, Fourth, Fifth, or Sixth Amendments. Use one of the following online U.S. Supreme Court Case Collections:

Cornell Law
www.law.cornell.edu/supct/topiclist.html

Find Law
<http://caselaw.lp.findlaw.com/casesummary/index.html>

Oyez
www.oyez.org/issues/

Then:

1. Identify the parties involved.
2. Describe the background facts. What happened?
3. Describe the constitutional issue the Court is trying to decide. Be sure to describe which amendment the Court made applicable to state or local government.
4. Describe what the lower courts decided in this case and Court precedents that shaped this majority opinion.
5. Explain how the Supreme Court majority ruled (with a summary of its rationale).
6. Do you agree or disagree with the Court’s ruling? Explain your opinion about the decision.

Teaching About the Supreme Court: Eight Student Activities

Activity #1: The U.S. Supreme Court serves as the judicial system’s final arbiter. Thousands of cases are filed each year with the Supreme Court, although fewer than 100 will be heard. Review the process by which cases are selected to be heard by the Supreme Court. What criteria do the justices use in choosing a case? Pretend that you are all members of the Supreme Court, and examine the court cases listed above. Supposing they had all been filed with your Court this year, which five would you choose to hear? Write down the process you used in making your selection. For each case make a decision as though you had to decide today. Write majority and dissenting positions for each case. Share with the class when completed. Have new precedents been established?

Activity #2: Unlike the president or members of Congress, Supreme Court justices, once selected, serve for life. Why do you suppose the founders decided to remove our justices from the election cycles in which other government officials must participate in? Does

this make our justice system undemocratic? Understanding that justices serve for life, the selection process becomes especially important. Imagine that you are the advisers to the president. An opening has just occurred on the Court. First establish a criteria for filling the position. What are the most important attributes needed in order to be an effective Justice? Write a letter to the president with your suggestions.

Activity #3: Whether or not the Supreme Court practices “judicial restraint” or “judicial activism” has provoked a continuous debate. Survey the primary issues involved in each position. Document your research. Write down the primary arguments for each. What are the advantages and disadvantages of each position? Which side do you agree with most? What are the dangers of each? Suppose you are about to publish an upcoming *American Bar Association Journal* issue whose primary topic is the debate over judicial restraint and judicial activism. Create a table of contents for this issue. List 8–10 possible titles of articles. As is standard, include at least one political cartoon regarding this subject as well.

Activity #4:

- A. In a recent survey, fewer than 5 percent of Americans could name the chief justice of the U.S. Supreme Court. To remedy this shortcoming “visit” the Court online and familiarize yourself with each Justice. Create a chart that summarizes a brief biographical sketch of each Justice. Do you notice any shared characteristics?
- B. Throughout our history a number of justices have truly made a mark. Link to an historic site and select three to five justices from our past and create a chart similar to the one above. How do the characteristics of historic justices compare to our contemporary Court?

Activity #5:

- A. What exactly does our Court do? Link to the following Court site and browse through an overview of the Court rules. Which rules stick out in your mind? Any surprises? Write down the most important procedures.
- B. The Court is governed by a strict calendar. Browse through this year’s calendar. Write down at least five observations about it. What does the calendar suggest about the Court? Choose at least three upcoming cases and suggest an outcome. Write down your predictions and keep track as the Court decides.

Activity #6: Using the resources available to you and what you already know, imagine that you are a member of the U.S. Supreme Court. Write either a concurring or dissenting opinion in the case *Bush v. Gore* (2000). Try to support your decision with facts and court precedent. Share your decision with other “justices” and debate the merits of your opinion.

Activity #7: Justice Robert Jackson once wrote, “We are not final because we are infallible, but we are infallible only because we are final.” Try to understand what he meant by defining

the key words he used and rewriting his quote using your own terms. Write a short essay in which you either agree or disagree with Justice Jackson's words. How might this quotation relate to the 2000 presidential election?

Activity #8: Investigate the impact on the Court of the case *Bush v. Gore* (2000). Try to find information and commentary as to how the Court has been affected by its bold decision in this presidential election. You might want to look at subsequent cases and contact with other branches such as confirming new federal judges. Imagine you are a law school professor, and prepare a lecture on the impact of the case *Bush v. Gore* (2000). What questions might your students have? How would you answer them? Share your findings with your colleagues.

Judiciary Unit: 25 Review Questions

1. For what reasons was the federal court system established?
2. There are two main categories of law. What are they, and what is the difference between the two?
3. The United States has a dual court system. What does this mean? Give an example.
4. What is "jurisdiction," and what kinds of jurisdiction do various federal courts have?
5. How are federal judges chosen? How long are their terms?
6. What do we call federal trial courts? State trial courts?
7. For what reasons is the Supreme Court of the United States often called the High Court?
8. Describe the composition of the Supreme Court in general.
9. The Supreme Court's powers rest in its power of judicial review. In what court case was this principle first defined, and what does it mean?
10. What types of jurisdiction does the Supreme Court generally practice?
11. How many cases are appealed to the Supreme Court each year? Of these, how many does it accept for decision?
12. How does the Supreme Court go about deciding which cases to hear?
13. In which way do most cases reach the Supreme Court?
14. The Supreme Court makes its decision after going through three basic steps. What are they?
15. Describe the oral arguments phase of Supreme Court decision making.
16. What are legal briefs? What role do they play in Supreme Court decisions?
17. What are amicus curiae briefs?
18. Describe the conference phase of Supreme Court decisions. How is it unique?
19. What type of vote is required in order to decide a case before the Supreme Court?
20. Why do the federal appellate courts, like the U.S. Supreme Court, write out their opinions after a decision? What are the advantages and disadvantages of doing so?

21. What is a majority opinion? Who writes it?
22. What is the difference between a concurring opinion and a dissenting opinion?
23. What type of Supreme Court decision carries the most force? Explain.
24. What title is given to the federal government's chief lawyer? In what executive department would you find this person?
25. Describe the difference between judicial activism and judicial restraint.

Supreme Court Review: Essential Terms and Concepts

amicus curiae brief	clerks of the court
appeal	comity
bills of attainder	common law
blue slip	concurring opinions
“borked”	dissent
briefs	due process (procedural and substantive)
writ of certiorari	ex post facto laws
civil law	habeas corpus
class actions	in camera
incorporation doctrine	recuse
informa pauperis	rule of four
in re	senatorial courtesy
judicial review	seniority
judicial self restraint	solicitor general
jurisdiction (appellate and original)	standing
justiciability	stare decisis
least dangerous branch	strict scrutiny
obiter dictum	“the Court follows the election returns”
original intent	terms
per curiam	U.S. Reports
precedent	

Other Fourteenth Amendment/Selective Incorporation Resources

Books

Yalof, David Alistair. *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees*. Chicago: University of Chicago Press, 1999.

Web Sites

Legal Information Institute—Cornell Law School
www.law.cornell.edu/constitution/constitution.amendmentxiv.html

Exploring Constitutional Conflicts: The Incorporation Debate
www.law.umkc.edu/faculty/projects/FTrials/conlaw/incorp.htm

The Fourteenth Amendment and the Development of Federal Citizenship

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Introduction: Unifying a Nation

The United States began as an experiment in states' rights. Under the Articles of Confederation—the first attempt at national government by the new nation—the federal government was left weak in favor of the more powerful states, which could determine their powers and the rights of their citizens without much oversight from any national entity. This experiment did not last long, however. Due to a multitude of problems, the founders of the United States determined that a stronger national government would be needed in order for the young nation to survive. The solution was the U.S. Constitution.

Even though the new Constitution was meant to strengthen the national government, there was still a question of how power would be divided between the national and state level. The questions began early on with the Alien and Sedition Acts, passed during the presidency of John Adams. In an attempt to consolidate the power of the Federalist Party, Congress passed a series of laws to cripple the newly formed Democratic-Republican Party. In response to these new laws, James Madison and Thomas Jefferson wrote the Virginia and Kentucky Resolutions, which introduced the theory of nullification. This allowed the governments of each individual state to nullify, or declare null and void, any law passed by the national government. In practice, this theory stripped the federal government of any oversight function toward the state governments.

The theory of nullification continued as a persistent controversy throughout the period before the Civil War. In the 1830s nullification issues arose involving the use of a national tariff to raise revenue, and the torch of nullification was picked up by Senator John C. Calhoun of South Carolina. Ultimately nullification became closely identified with defenses of slavery on the part of the South; by the 1850s, the essential question it posed about distribution of powers in the American republic could not be avoided. As Abraham Lincoln stated in 1858 in his campaign against Stephen Douglas, “A house divided against itself cannot stand.”

At the completion of the Civil War, the question of national sovereignty over the states was finally answered, and the Fourteenth Amendment to the Constitution, ratified in 1868, rejected nullification. It created a new federal citizenship in which all people of the United States were constitutionally citizens of the United States, and not just of the states. As the amendment clearly states, “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.” While in theory this created an equality of citizenship, it took more than a century of struggle to make that equal citizenship a reality.

Student Activities on the Fourteenth Amendment

1. Have the students of the class research the history of citizenship in the United States. They should look into two areas: citizenship requirements in the antebellum period, well before Reconstruction and the Fourteenth Amendment, and current citizenship requirements. As part of students' research, the citizenship requirement should be compared and contrasted. Key questions that should be asked:

- a. What are the differences in requirements?
- b. What were the differences in requirements among the individual states during the antebellum period?
- c. How have the requirements evolved over time?

The answers to these questions and the results of the research could be presented either in paper form or in a classroom presentation.

2. Have the class read the Farewell Address of President George Washington in 1796. An edited version of the text could be used to concentrate on his discussion of the importance of viewing ourselves as Americans rather than as members of different regions. (The address can be found in many places on the Internet, including www.yale.edu/lawweb/avalon/washing.htm.) Washington's reasons for the importance of nation over region should be explored. Questions that could be asked:

- a. How do you think Washington viewed the idea of national citizenship?
- b. According to Washington, why is it important to view things on a national rather than a regional basis?
- c. What consequences did Washington predict if the people of the United States continued to view their citizenship as resting on a state or regional basis?
- d. Did the predictions of Washington prove to be true?
- e. Why didn't the people of the United States heed the warnings of President Washington?

The document could very easily be used in a discussion format. The topics discussed by Washington should lend themselves well to classroom discussion and debate. The class could be divided into two groups, with each one taking the side of either regional or national identity.

3. Have the students take a citizenship test. Different copies of citizenship tests can be found on the Internet. A few sites that can be used are:

U.S. Citizenship and Immigration Services (USCIS) citizenship test
<http://usgovinfo.about.com/blinstst.htm>

USCIS Pilot Naturalization Test (being tested for release in 2008)
http://usgovinfo.about.com/library/blinstst_new.htm

Durham/Chapel Hill *Herald-Sun* VoteBook Citizenship Test
www.herald-sun.com/votebook/citizenship/citstart.html

Questions to consider when discussing the students' results of the tests:

- a. Were the test questions fair?
 - b. Did the questions concentrate on the national level or the state level?
 - c. What importance does the test put on the state in which the person seeking citizenship currently resides?
 - d. Did the test ask questions relevant to being a good U.S. citizen?
4. Use the current issue of immigration to develop a classroom discussion about citizenship in the United States. The class could be divided into several groups that could be assigned different views on the issue of immigration and citizenship in the school year. Ask students to consider the following questions in researching immigration and in any classroom discussions that may take place as a result:
- a. What are some current solutions to the issue of immigration and citizenship in the United States?
 - b. What is the impact of illegal immigration on the United States?
 - c. Could citizenship of North America eventually change, similar to the way U.S. citizenship changed from the antebellum period to the twentieth century?

Due Process Clause

One major aspect of the Fourteenth Amendment is the “due process” clause. Through decisions of the Supreme Court, the Fourteenth Amendment had been used to incorporate many amendments of the Bill of Rights on the state level. There are two ways that the Bill of Rights can be incorporated. One, known as “total incorporation,” applies all amendments of the Bill of Rights to the states. This view has not been taken by a majority of the Supreme Court. Instead, starting with the case *Gitlow v. New York* in 1925, the Supreme Court decided to use selective incorporation to apply some of the amendments contained in the Bill of Rights to the states. This application has been done by the Court on a case-by-case basis. In general, selective incorporation has been used with the First, Fourth, Fifth, Sixth, and Eighth Amendments.

Student Activities on the Due Process Clause

1. Have the class use the *Close Up* video that discusses the issue of flag burning and the Supreme Court case *Texas v. Johnson* in 1989. After watching the video, divide the class into two groups: those opposed to the protection of flag burning and those in favor of its protection under the First Amendment as freedom of expression. Questions to consider:
 - a. How far should the Supreme Court go in protecting the freedom of expression?
 - b. Can selective incorporation go too far by protecting speech or expression that could be detrimental to public safety or the general good of the nation?

The class could also be assigned the reading of the case summary and the viewpoints for both the prosecution and the defense. After reading the summary, each student could,

either individually or as a member of a small group, write his or her own majority, dissenting, or concurring opinions based on this case. The class could then research on its own other instances where the precedent set by this case could be applied in the students' own state.

2. Have the class use the *Close Up* video that discusses the issue of prayer in school and the Supreme Court case *Wallace v. Jaffree* (1985). After watching the video, divide the class into two groups: those opposed to the use of prayer in school and those who support it. Questions to consider:

- a. How far should the First Amendment go in protecting the right for students to pray in school?
- b. What should be considered prayer in school? Does the reciting of the Pledge of Allegiance and the statement "under God" fall under this category?

The class could also be assigned the reading of the case summary and the viewpoints for both the prosecution and the defense. After reading the summary, each student could, either individually or as a member of a small group, write his or her own majority, dissenting, or concurring opinions based on this case. The class could then research on its own other instances where the precedent set by this case could be applied in the students' own state. Students could also research the Lemon test, which was established in the Supreme Court case *Lemon v. Kurtzman* in 1971. Have the students use the Lemon test to determine whether their school may have ever violated the precedents set by the Supreme Court when it comes to the incorporation of religion in school.

3. Have the class research the use of the death penalty at the state level. Issues that could be considered in the research:
 - a. How many times have individuals been executed in the past two, 10, or 30 years?
 - b. What type of procedure is used when carrying out an execution in this state?
 - c. For what types of crimes were individuals executed in this state?
 - d. Were there instances where the governor granted a pardon, reprieve, or commutation?
 - e. In how many cases did the convicted claim his/her innocence?
 - f. How many cases were appealed based on the "cruel and unusual punishment" provision of the Eighth Amendment?

The students could present their research to the class. Debates could be held about the incorporation of the Eighth Amendment on some of the cases. As part of the discussion, students could look into the actions of former Illinois governor George Ryan and his blanket clemency. Students could also look into the actions of college students involved in the Northwestern Law School project.

4. Have the class conduct a mock trial. Students would research a case involving selective incorporation. The class would be divided into groups representing the prosecution, defense, and the Supreme Court justices. Research of the case would involve any

constitutional questions arising from the situation. Possible cases to use include but should not be limited to:

- a. *Miranda v. Arizona* (1966)
- b. *Furman v. Georgia* (1972)
- c. *Escobedo v. Illinois* (1964)
- d. *Texas v. Johnson* (1989)
- e. *Gideon v. Wainwright* (1963)

The mock trial should be conducted as if it were being reviewed by the Supreme Court. The prosecution and the defense would present their case, and the justices would be able to interject and ask questions in order to clarify points. At the end of the trial, the students representing the Supreme Court would deliver their majority, concurring, and dissenting opinions.

The Equal Protection Clause

Another important aspect of the Fourteenth Amendment is the inclusion of the “equal protection” clause. The clause expresses that no state can “deny to any person within its jurisdiction the equal protection of the laws.” Since the inception of the amendment, the equal protection clause has been an object of debate. With the end of Reconstruction, and the removal of federal troops from southern territory, the South was able to develop an environment for African Americans that violated the idea of equal protection at virtually every turn. The Jim Crow laws passed by southern states developed a policy of segregation and discrimination whose aftereffects are still felt today. Segregation was considered constitutional until the landmark case *Brown v. Board of Education* (1954). (There were a handful of successful challenges to segregationist laws, but the “separate but equal” doctrine remained in effect until the Court’s ruling in *Brown*.) The decision handed down in the *Brown* case determined that separate facilities for different races is inherently unequal. Many consider this decision to be the beginning of the modern civil rights movement.

The *Brown* decision was important for the enforcement of the equal protection clause of the Fourteenth Amendment, but it did not finish the job. Beginning in 1957 and continuing into the 1960s, Congress passed multiple laws that would continue to expand the national government’s enforcement of the equal protection clause by outlawing things such as segregation in all public facilities, and protecting of the right to vote for all citizens. As the country moved into the 1970s and 1980s, the issue of equal protection under the law moved on to involve other minority groups, as well as the disabled and, more recently, gays and lesbians.

Student Activities on the Equal Protection Clause

1. Show the video *Eyes on the Prize*. The program covers the civil rights movement from 1954 to 1985. The Web site for the program (www.pbs.org/wgbh/amex/eyesontheprize/)

has many resources for teachers and students that could be used for class projects and classroom discussions.

2. Divide the class into groups. Assign each group a piece of legislation from the modern civil rights movement. The group should research the legislation. Its research should consider some of the following issues:
 - a. What aspects of equal protection did the legislation cover?
 - b. What challenges were made to the legislation?
 - c. How successful was the legislation in achieving equal protection?
 - d. When was the legislation passed and who was responsible for its passage?

The groups should then present their findings to the class. The class could then discuss the different pieces of legislation. Looking at the chronology of the legislation, the class could discuss the difficulty of trying to ensure equal protection for different groups in the United States and some of the struggles the civil rights movement has dealt with.

3. Have the class research and report on the issue of affirmative action and how it pertains to the “equal protection” clause of the Fourteenth Amendment. In doing so, have the class research the laws that have been passed to enforce affirmative action as well as some of the backlash from such action. Cases that could be researched for this discussion include but should not be limited to:
 - a. *Lau v. Nichols* (1974)
 - b. *Reed v. Reed* (1971)
 - c. *Wesberry v. Sanders* (1964)
 - d. *Regents of the University of California v. Bakke* (1978)
 - e. *Grutter v. Bollinger* (2002)
 - f. *Gratz v. Bollinger* (2002)
4. Have the class research the issue of gay marriage. A class discussion or debate could be held based on this topic. The class should relate the issue of gay marriage to the “equal protection clause” of the Fourteenth Amendment. Topics that could be discussed based on gay marriage and equal protection could be:
 - a. Is banning gay marriage a violation of the “equal protection” clause?
 - b. What are some of the laws concerning homosexuality throughout the United States?
 - c. Have students read, compare, and contrast the Supreme Court’s decisions in *Bowers v. Hardwick* (1986) and its reversal of that precedent in *Lawrence v. Texas* (2003). Have students research and answer why the Court effectively changed its mind. Answers could include new members on the Court, greater tolerance, and increased willingness to compare U.S. laws to laws and rights in other countries.
 - d. Which of these laws are legitimate? Which of these laws seem to violate the “equal protection” clause of the Fourteenth Amendment?

- e. What other issues involving gay rights are affected by the “equal protection” clause of the Fourteenth Amendment?

Additional Web Resources:

Center on Wrongful Convictions—Northwestern University
www.law.northwestern.edu/wrongfulconvictions/

Should Homosexuals Have the Right to Laws Protecting Them from Discrimination
(about civil rights for gays and lesbians)
www.crf-usa.org/brown50th/gays_rights.htm

Eyes on the Prize: PBS Companion Web Site
www.pbs.org/wgbh/amex/eyesontheprize/

The Fourteenth Amendment
<http://caselaw.lp.findlaw.com/data/constitution/amendment14/>
www.law.cornell.edu/constitution/constitution.amendmentxiv.html

Individual Supreme Court Cases
<http://supreme.lp.findlaw.com/>
www.law.cornell.edu/supct/index.html

U.S. Supreme Court Home Page
www.supremecourtus.gov/

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