

Lesson 14

THE CONSTITUTION, FEDERALISM, AND THE STATES

Lesson Objectives

When you complete Lesson 14, you will be able to:

- Explain the division of power between the federal and state governments.
- Explain the purpose of the Full Faith and Credit Clause and the Privileges and Immunities Clause of Article IV and what they require of the states.
- Describe how new states join the Union according to the New States Clause.
- Understand the absolute and qualified prohibitions on the states in Article I, Section 10 of the Constitution: including the State Treaties Clause, the State Coinage Clause, the State Bill of Attainder, State Ex Post Facto Clauses, the Obligation of Contracts Clause, and the Import–Export Clause.
- Explain the purpose of the State Action Clause and the Enforcement Clause and the scope of Congress’s power under the clauses.
- Understand the three main theories about the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment.
- Understand the original meaning of the Due Process Clause of the Fourteenth Amendment and how the Supreme Court has applied the clause.
- Understand the original meaning of the Equal Protection Clause of the Fourteenth Amendment, what it requires of states, and generally how the Supreme Court has applied the clause.
- Explain the purpose of the Apportionment of Representatives Clause, the Disqualification for Rebellion Clause, and the Debts Incurred During Rebellion Clause.

Unit 5

Introduction:

Understanding Federalism and the Relationship Between the States and the Federal Government

While everyone knows that this is a nation of states, few seem to think that this division is more than a quirk of history. Yet federalism is a crucial component of our system of government and part of the very infrastructure that makes our political liberty possible.

At the Constitutional Convention, despite a clear recognition of the need for additional national authority in the wake of the Articles of Confederation, there was great concern that an overreaction might produce an all-powerful national government. While they harbored no doctrinaire aversion to government as such, the Founders remained distrustful of government, especially a centralized national government that resembled the British rule against which they had revolted. The solution was a unique American innovation: a *federal* government with strong but limited national powers that respected and protected the vitality of the states. Half a century later, Alexis de Tocqueville would celebrate democracy in America as precisely the result of the political life supported and encouraged by this decentralized structure.

The United States Constitution is but one aspect of constitutional government in the United States. There are now 50 state governments, each with its own constitution, and these state governments are key components of our “compound republic.” Although national powers were clearly enhanced by the Constitution, the federal government was to exercise only delegated powers, the remainder being reserved to the people or the states as defined in their constitutions. The federal government was not supposed to hold all, or even most, of the power.

The distinction between national and state government is inherent throughout the Constitution. As Madison explains in *The Federalist* No. 39, the government created by the Constitution is “partly national and partly federal.” The House of Representatives is elected directly by the people, but to give states more leverage within the national government, equal state representation in the Senate was blended into the national legislature (and permanently guaranteed in Article V). The executive is the most national of the branches, yet the Electoral College process by which the President is elected is based on states. It is striking that in this powerful national government there is not a single official chosen by a national constituency. The process by which the Constitution is amended is ultimately based on state approval. The document was ratified by the states.

To the extent that the United States federal government acts on individuals, it is national; but in the extent of its powers, it is limited to certain national functions. “Since its jurisdiction extends to certain enumerated objects only,” Madison concludes, it “leaves to the several States a residuary and inviolable sovereignty over all other objects.” Here is how Madison described this in *The Federalist* No. 45:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement and prosperity of the States.

In the same way that the separation of powers works *within* the federal and state constitutions, federalism is the basic operational structure of American constitutional government as a whole and provides the process by which the two levels of govern-

ment check each other. In America’s federalist system, political power is divided between the federal government and the states; the power allotted to each is then further subdivided among distinct and separate departments. Madison explains in *The Federalist* No. 51 that, because of this arrangement, “the different governments will control each other; at the same time that each will be controlled by itself.”

“This balance between the National and State governments ought to be dwelt on with peculiar attention, as it is of the utmost importance,” Hamilton argued at the New York state ratifying convention. “It forms a double security to the people. If one encroaches on their rights they will find a powerful protection in the other. Indeed, they will both be prevented from overpassing their constitutional limits by a certain rivalry, which will ever subsist between them.”

Although federalism was a practical invention of the Constitutional Convention, the idea of maintaining strong state governments was nothing new. The general notion that political authority and decision-making should be kept as decentralized and close to home as possible was a well-established theme of the Anti-Federalists. The view of those who doubted the political efficacy of the new Constitution was that good popular government depended upon a political community that would promote civic or public virtue as much as—if not more than—it did on a set of institutional devices designed to check the selfish impulses of the majority. However, the structure of federalism is not only an “auxiliary precaution.” By keeping authority and functions divided between two levels of government, federalism recognizes legitimate national power at the same time that it protects a sphere of state autonomy and local self-government.



Check Understanding

Have students recall the Supremacy Clause and explain how it supports the idea of federalism. (The Supremacy Clause was designed to permit both levels of government to act individually without interference from one another. However, in the case of a conflict, valid federal laws take priority over state law. The Supremacy Clause supports the Framers’ understanding of federalism by creating a mechanism to deal with conflict between the states and the federal government.)



Active Reading

Read aloud the Ninth and Tenth Amendments. *Ask students how the language of the amendments supports the Founders’ idea of federalism?* (The Ninth Amendment states that the list of rights in the Constitution is not exhaustive. The people retain rights that are not listed in the Constitution. The Tenth Amendment states that all government powers—except for those that the Constitution grants to the federal government—belong to the states or the people. These amendments support federalism insofar as they reiterate that the Constitution is a document of limited powers, the states retain a whole host of powers not granted to the federal government, and the people retain a whole host of rights, even those not listed.)

Part 1: The States and Their Relationships with Other States

Full Faith and Credit Clause

Article IV, Section 1

Privileges and Immunities Clause

Article IV, Section 2, Clause 1

New States Clause

Article IV, Section 3, Clause 1

Full Faith and Credit Clause – Article IV, Section 1

Essay by Erin O'Hara (pp. 267–269)

As James Madison noted, the Full Faith and Credit Clause of the Constitution promotes “harmony and proper intercourse among the states.” It chiefly unites court systems of different states insofar as it ensures that courts of one state honor the judgments of courts in another state. The Supreme Court has applied this clause in three distinct ways: determining when one state’s court may take jurisdiction over claims involving another state, determining which state law applies in a case with multi-state disputes, and recognizing and enforcing judgments from another state’s court.

First, the Court has used the Full Faith and Credit Clause to require state courts to hear claims that arise under sister-state laws. A state court cannot categorically refuse to hear claims that arise under another state’s laws, but it may be exempt from this requirement if, for instance, it does not recognize the equivalent claim based on local law. Additionally, a state cannot limit a litigant’s options for a hearing to its local courts alone.

Second, the Supreme Court guidelines regarding the application of a state’s laws for a multi-state dispute have varied. At first, the laws of the state where the dispute occurred were applied, even if the trial took place in a different state, but if the state had an interest in the case, the state’s court could apply its own laws. Today, state courts have a degree of discretion regarding which state’s law to apply.

Third, the Supreme Court has ruled that states must recognize and enforce (to the same extent that the deciding state would) the decisions of other states’ courts. There are a few exceptions to this rule relating to personal jurisdiction, deeds of land, and penal claims.

In recent years, questions have emerged about the application of the Full Faith and Credit Clause to issues of marriage, divorce, and child-rearing. For instance, state courts change child support and custody judgments made in another state if these alterations are “in the best interests of the child.” The Defense of Marriage Act (1996) allowed states not to recognize same-sex marriages from other states.



Active Reading

Ask: When would one state court not be required to enforce judgments made by another state court? (when a defendant was not present in court when a judgment against him or her was made, when judgments are related to claims that are purely penal, in cases involving land deeds.)



Check Understanding

Ask: Why does James Madison cite the Full Faith and Credit Clause as one that promotes “harmony and proper intercourse among the states”? (The Full Faith and Credit Clause ensures that states recognize and honor the judgments of other states’ courts. It also provides guidance for state courts to determine when the laws of another state apply in a proceeding.) Have students read the Interstate Rendition Clause. Ask: What does the Interstate Rendition Clause do and how is it important to a functioning legal system? (The Interstate Rendition Clause ensures that criminals may not evade prosecution in one state by escaping to another state.)

Unit 5

Privileges and Immunities Clause — Article IV, Section 2, Clause 1

Essay by David F. Forte and Ronald Rotunda (pp. 269–273)

The Privileges and Immunities Clause ensures that states do not discriminate against citizens of other states in judicial processes and economic activities. Because the concept of privileges and immunities referred to the long tradition of rights afforded to the colonists as Englishmen, the Framers approved the clause without controversy.

The concept of privileges and immunities meant that colonists were part of a unified political community, could travel freely and establish permanent residencies in any other colonies, received certain legal rights and were guaranteed access to courts, and were able to sell their goods in other colonies.

Before independence, the Declaration and Resolves of 1774 outlined several natural rights of the colonists, including the right to “life, liberty, and property.” The delegates to the First Continental Congress distinguished between natural rights and privileges and immunities, describing the latter as positive rights granted by royal charter or provincial law.

The Articles of Confederation contained a clause protecting the privileges and immunities of citizenship. Although revised several times, the final version of the clause created common citizenship, guaranteed freedom of travel, and provided equal protection of the laws by protecting freedom to conduct business.

Based on James Madison's objections, the Privileges and Immunities Clause in the Constitution was simplified. It created common citizenship, but Congress still retained power to determine who could become citizens. It also prevented states from discriminating against citizens of other states in judicial processes and economic activities.

Many states distinguished between privileges and immunities on one hand and natural rights on the other. Privileges and immunities remained positive rights. A state could repeal them, and an individual had no right to claim them for himself. Natural rights are not granted by the state; they are inherent in the nature of man, and the state only secures them. The Supreme Court held in *Corfield v. Coryell* (1823) that privileges and immunities included natural rights. However, in the *Slaughter-House Cases* (1873), the Court rejected this idea.



Before You Read

In many of the charters of the original colonies, the Crown guaranteed some variation of franchises, privileges, immunities, or liberties to colonies to create a common subject status among free-born Englishmen. "Liberties" were not rights of individuals, but the right of a corporation, manor, or abbot to make and enforce laws within their respective jurisdictions. In contrast, "immunities" were exemptions from the force of the law that were granted by the king. Immunities gave individuals, towns, or other entities freedom from having to abide by a legal obligation. The courts enforced various privileges such as the right to trial by jury, the rights of possession and inheritance of land, and the right of merchants in certain towns to trade freely.



Active Reading

Have students read the section on the Declaration and Resolves of 1774 (beginning at the bottom of page 270 and ending at the top of page 271). **Ask:** **What natural rights did the colonists possess?** (the rights to life, liberty, and property) What method did delegates use to describe colonists' immunities and privileges? (They referenced English grants: royal charters and provincial laws.) **What distinguished natural rights from immunities and privileges?** (Immunities and privileges were positive rights. Natural rights were inherent in the nature of man.)



Make a Real-Life Connection

Read the section on the privileges and immunities granted to the colonists on page 270 (start with the final paragraph beginning with “In America, there were specific practical effects” and stop at “allowed for a robust exchange of goods and commercial paper”). Ask: **Do American citizens today enjoy the same privileges and immunities?** (Americans are citizens of one country. People in the United States travel freely. People start businesses in any town or state freely. The Internet has also allowed individuals to buy and sell products in every state.)

New States Clause — Article IV, Section 3, Clause 1

Essay by David F. Forte (pp. 276–278)

The New States Clause outlines the process by which new states enter the Union. Congress admits new states. New states could be created within an existing state, or multiple existing states could form a single new state, with the consent of both Congress and relevant state legislatures.

The Committee of Detail at the Constitutional Convention originally proposed that new states be admitted on the same terms as existing states. Gouverneur Morris opposed considering new states equal to the original ones. Although James Madison supported the equality of states, the explicit equality requirement was removed from the language by a vote of 7 to 2. The Constitution was silent on the equality of states.

Using its discretion, Congress declared that all new states would be on equal footing with the original ones. Congress also decided to admit states formed from territory acquired by the Union after the Constitution went into effect. Gouverneur Morris and the New England Federalists opposed this practice, arguing that Congress could admit states only from the territory held by the Union prior to the Constitution. Later practice rendered Morris’s and the Federalists’ argument moot. The Supreme Court has upheld Congress’s practice of admitting new states on equal footing to the original.



Before You Read

Ask: What does the word “equality” mean? (Two or more things are equal if they have the same pertinent properties.) **How are new states added to the Union?** (Answers will vary. Students may mention that territories may apply for statehood and that Congress decides which territories to admit.)



Make a Real-Life Connection

Have students research which state was first to join the Union, which state joined the Union most recently, and when their home state joined the Union.



Active Reading

Ask: What have you learned about the role of the states in our system of government? (Answers will vary. States determine the qualifications for voting. States select members of the Electoral College. States hold the largest portion of the legislative power.) Are there clauses in the Constitution that suggest all states are equal? (States receive equal representation in the Senate, a provision that cannot be amended. There are certain clauses in the Constitution that limit Congress's ability to give preference or advantages to one state over another: for instance, the Port Preference Clause and the Taxation Clauses.)



Check Understanding

Have students complete the following assessment to check their understanding of Lesson 14, Part 1. Review any material for questions they have missed.

Fill in the Blank: Write the correct word or words in each blank.

1. ____ opposed admitting new states to the Union on an equal footing with the original states. (**Gouverneur Morris**)
2. The ____ outlined several natural rights of colonists, including the rights to life and liberty. (**Declaration and Resolves of 1774**)
3. "Liberties" and "franchises" constituted the power of a governing unit to make _____. (**rules**)
4. "Immunities" were exceptions that the king granted from the force of the _____. (**law**)
5. The ____ proposed the Privileges and Immunities Clause. (**Committee of Detail**)

Short Answer: Write out your answer to each question.

1. Article IV of the Articles of Confederation sought to create what? (**a common citizenship, a right to travel, and equal protection for commercial activities**)
2. What is the essential purpose of the Full Faith and Credit Clause? (**to assure that the courts of one state will honor the judgments of the courts of another state without the need to retry the whole cause of action**)

3. What were some practical effects of the guarantees of privileges and immunities to colonists in the New World?
 - **Membership in a common political community**
 - **A right to travel**
 - **A series of particularly defined rights centering around access to the courts**
 - **Equal protection of the laws for commercial activities based on the right of every freeman to a lawful calling**

True / False: Indicate whether each statement is true or false.

1. The first sentence of the Full Faith and Credit Clause appeared almost verbatim in the Articles of Confederation. **(True)**
2. The Crown granted to the original colonists in the New World the legal rights of serfs and indentured servants. **(False. The Crown granted to the colonists in the New World the legal rights of freemen.)**
3. New states cannot be formed out of existing states. **(False. Providing that all parties—the new state, the existing state, and Congress—consent, a new state can be formed out of an existing state.)**
4. All the Framers agreed that New States would be considered equal to the states already in the Union. **(False. Some Framers opposed considering new states equal to the original states.)**

Part 2:

The Constitution’s Limitations on the States

State Treaties

Article I, Section 10, Clause 1

State Coinage

Article I, Section 10, Clause 1

State Bill of Attainder and State Ex Post Facto Laws

Article I, Section 10, Clause 1

Obligation of Contracts

Article I, Section 10, Clause 1

Import–Export Clause

Article I, Section 10, Clause 2

Compact Clause

Article I, Section 10, Clause 3

State Treaties – Article I, Section 10, Clause 1

Essay by Brannon P. Denning (pp. 167–168)

The Constitution establishes a limited government. A centralized national government certainly has the potential to threaten individual liberty, but so do state governments. Our Constitution recognizes the threat from both levels of government and therefore contains specific limitations on the powers of each. Article I, Section 9 focuses on the limits of the federal government; Article I, Section 10 limits state governments’ actions. Section 10, Clause 1 consists of absolute prohibitions on the states; Section 10, Clauses 2 and 3 consists of qualified prohibitions on the states, meaning prohibitions that Congress may suspend.

The State Treaties Clause is an absolute prohibition. States may not enter into a “treaty, alliance, or confederation” and may not issue letters of marque and reprisal. Treaties, alliances, and confederations are formal, binding agreements between different countries under the jurisdiction of international law. Article I empowers Congress alone to grant letters of marque and reprisal, which traditionally allowed holders to engage in hostilities and seize enemy property.

The Framers included these separate restrictions on states to ensure that the federal government exercised all power over foreign affairs. James Madison and Joseph Story defended the clause as appropriate, since the federal government would be responsible for directing foreign affairs, which includes possessing the military means to protect the nation. Though it rarely has the opportunity to address this clause, the Supreme Court has affirmed that compacts are different from treaties. States may enter into compacts or agreements with the consent of Congress. However, under no circumstances may they enter into treaties with other nations.



Active Reading

Ask: The main purpose of the State Treaties Clause is to give the federal government power over what? (foreign affairs)



Check Understanding

Ask: What do you know about treaties that the United States has with other countries? (Treaties become law after the President has negotiated and the Senate has consented to them. Treaties are between countries, not between portions of countries; therefore, an individual state cannot enter into a treaty with another country.)



Check Understanding

Ask: What are letters of marque and reprisal? (They are forms of permission, usually granted to private individuals, to attack enemies of the nation and seize property.)

State Coinage – Article I, Section 10, Clause 1

Essay by David F. Forte (pp. 168–170)

The State Coinage Clause prohibits the states from making any form of money, including coins and bills of credit (meaning paper money not backed by specie). The purpose of this clause was to transfer power over economic policy from the states to the new federal government.

Both before and during the American Revolution, states issued various types of paper currencies to regulate their economies. These wildly fluctuating currencies resulted in complex debtor–creditor relationships and weak interstate commerce. In 1764, Parliament banned the colonies’ use of bills of credit as legal tender. During the Revolution, states again issued bills of credit to finance the war. After 1783, specie was limited, and states’ currency issues exacerbated the depression of 1784. Seeing the problems of state bills of credit, the Framers included the State Coinage Clause to prevent states from issuing paper money. After ratification, Alexander Hamilton pushed through a federal monetary reform program that included absorbing previous state and federal debt, creating a national bank, and levying taxes.

There was still a demand for circulating currency. Though states could not directly enter the monetary field, private and state-chartered banks would issue bank notes redeemable for specie. The Supreme Court upheld the practice because state governments were not issuing them. The number of such banks increased, and the value of their notes fluctuated, prompting Congress to tax the notes. Once the Supreme Court upheld the tax as constitutional, the use of state bank notes declined and eventually ceased altogether.



Before you Read

Ask: What do you recall about Congress's power over monetary policy from Lesson 5? (Answers will vary. Students may mention that the federal government retains full control of monetary policy, citing Congress's power to coin money, punish counterfeiting, and establish rules of bankruptcy. They may note that the Founders were leery of bills of credit and intended that Congress issue money backed by precious metals to ensure a stable monetary supply.)



Active Reading

Ask: What were some of the monetary policy changes Alexander Hamilton implemented after the ratification of the Constitution? (He implemented a program that included creating a national bank, introducing new tariffs, levying internal taxes, and having the federal government assume all previous federal and state debts.)



Work in Groups

Tell students that during the Founding period, the people of Rhode Island demanded paper money from the Assembly. They voted out the lower house of the Assembly and replaced the members with demagogues who favored creating massive inflation to allow certain factions to pay off their debts. Only the state senators, who were elected for five-year terms, were able to stem the tide of popular opinion. Bearing this incident in mind, have students create a list of three reasons why the Framers may thought that individual states should not be allowed to monitor currency. (Answers may vary. Students may, for instance, note that wildly fluctuating state currencies led to weak interstate commerce, created complex debtor-creditor relations, and allowed state legislatures to enact irresponsible inflationary policies.)

Unit 5

State Bill of Attainder and State Ex Post Facto Laws –

Article I, Section 10, Clause 1

Essay by David F. Forte (pp. 170–171)

As Article I, Section 9, Clause 3 prohibits the federal government from passing bills of attainder and ex post facto laws, so the State Bill of Attainder and State Ex Post Facto Clause prohibits states from passing similar laws. The Framers had witnessed Parliament's unjust use of bills of attainder in cases of treason. Such laws were contrary to the rule of law and violated the separation of powers, since bills of attainder usually sentenced an individual to death without a trial.

Many Founders (and political thinkers including Sir William Blackstone and Baron de Montesquieu) likewise considered ex post facto laws contrary to fundamental legal principles. Though it was universally agreed that ex post facto criminal laws were unjust by their very nature, there was some ambiguity about ex post facto civil laws. There is a difference between a law that *alters* pre-existing legal relationships and one that *affects* pre-existing legal relationships.

During the Constitutional Convention, George Mason suggested removing the prohibition on ex post facto laws so that states could enact useful retroactive legislation. The prohibition on state ex post facto laws remained but was interpreted to apply to state criminal laws only. The Supreme Court upheld this interpretation in *Calder v. Bull* (1798).

Other clauses limited potentially harmful retroactive civil laws. The Obligation of Contracts and State Coinage Clauses prevent states from passing potentially harmful retroactive civil laws relating to money and contracts. The Takings Clause and the Due Process Clause of the Fifth Amendment prevent the federal government from passing certain harmful retroactive civil laws.



Research It

Ask students to conduct research independently or in pairs about the uses of bills of attainder. Specifically, students should work to find answers to the following questions: What are bills of attainder? What role did bills of attainder play in the English legal system? What acts of injustice were committed by English legal officials using bills of attainder? What were some of the Founders' arguments against them?



Work in Pairs

Remind students that an ex post facto law punishes people after they have committed an action that was legal when they did it. Pair up students. Have each pair come up with an example of an ex post facto law to share with the class. (Answers will vary.)



Discussion Questions

Why are ex post facto criminal laws harmful but ex post facto civil laws sometimes acceptable? (Ex post facto criminal laws are unjust by their very nature because they punish a person—deprive the person of life or liberty—for an act that was not a crime when committed. Some civil laws may alter or affect pre-existing legal relationships, but those changes in the law may be necessary or helpful to the political community as a whole.)

Obligation of Contracts – Article I, Section 10, Clause 1

Essay by Richard A. Epstein (pp. 171–175)

The Obligation of Contracts Clause prohibits the states from passing laws “impairing the obligation of contracts.” Rufus King suggested the prohibition, relying on a central provision of the Northwest Ordinance. Although the original language of the clause suggested that it was meant to apply to previously formed contracts, the final version of the clause contains no such time limitation.

The Anti-Federalists were concerned that the Obligation of Contracts Clause, together with the limitations on state economic powers, would render the states incapable of helping debtors. Madison responded that the Obligation of Contracts Clause would promote general prudence, industry, and commerce. (Previous state economic policies directed at debtor relief included unjust laws that harmed state economies and commerce generally.) The Obligation of Contracts Clause thus performed two purposes: It protected individuals against their states and prevented the states from intruding on federal interests.

Unlike other prohibitions on the states in Article I, Section 10, Congress could not authorize violations of the Obligation of Contracts Clause’s provisions. The Framers designed the clause to protect interstate commerce from burdensome state regulation. The wording of the clause, however, does not distinguish between interstate and local contracts; therefore, it seems to apply to both. Indeed, the clause was the only open-ended federal constitutional guarantee that applied to the states. Accordingly, it was the subject of much constitutional litigation.

The Supreme Court’s interpretation of the Obligation of Contracts Clause is convoluted. Some litigation has focused on application of the clause to state actions. Chief Justice John Marshall interpreted the clause broadly to restrain government from renegeing on contracts, but this interpretation coexisted uneasily with the principle of state sovereign immunity, which prevents a state from being sued for breach of ordinary commercial contracts. Although immunity did not allow states to renege on their contracts for services already performed, the extent of protection offered by the Obligation of Contracts Clause in light of sovereign immunity is a subject of debate.

Most litigation over the Obligation of Contracts Clause, however, focuses on state regulation of private agreements. The clause protects pre-existing contracts; that is, the state could not change the rules of the legal system to benefit one party to the agreement. In *Ogden v. Saunders* (1827), the Supreme Court ruled that the clause does not limit the state’s power to regulate contracts yet to be formed. On one level, this is commonsensical. On another level, a broad refusal to apply the clause prospectively has potential for misuse: For instance, it would be possible for legislatures to enact partisan legislation to limit the contracting abilities of certain parties. In practice, the ruling in *Ogden* meant that state economic regulation was outside the scope of constitutional litigation. Most litigation of state economic regulation has occurred under the Commerce Clause or the Due Process Clause.

There are two exceptions to the Obligation of Contracts Clause: the just compensation exception and the police-powers exceptions. The Obligation of Contracts Clause does not prevent the government from using its eminent-domain power to take property with just compensation. Likewise, a state may still use police power to regulate for the sake of health, safety, morals, and the general welfare. During the New Deal, the Supreme Court greatly expanded the scope of the police power, blurring the distinction between general welfare and special interests. *Home Building & Loan Ass'n v. Blaisdell* (1934) was a turning point, and *Exxon Corp. v. Eagerton* (1983) found that a “broad society interest” was sufficient to curtail contracts. Though there does not seem to be a limit to states’ police power over private contracts, the Court remains suspicious of state legislation to extricate a state *itself* from its own contract obligations.



Active Reading

Ask: Why were the Anti-Federalists concerned about the Obligation of Contracts Clause? (They thought that, together with the economic limitations of Article I, it would render states unable to provide relief to debtors.)



Active Reading

Have students think back to Congress’s powers regarding a commercial republic in Unit 2. Ask: How does the Obligation of Contracts Clause limit state power? (The clause limits the states’ power to change the terms of contracts to favor debtors over creditors or to prevent contracts between certain parties.) Ask: How does the Obligation of Contracts Clause help to foster a commercial republic? (The Obligation of Contracts Clause fosters a commercial republic because commerce requires contracts—to rent shop space, use equipment, sell certain products, and purchase goods and services. Preventing states from interfering with contracts and empowering Congress to establish other uniform rules enabled commerce to flourish between parties of a single state, between two or more states, and between the United States and other nations.)

Import–Export Clause — Article I, Section 10, Clause 2

Essay by Brannon P. Denning (pp.176–178)

The Import–Export Clause is a qualified prohibition on the states. It forbids the states from imposing duties on imports or exports unless Congress consents to the tax or the duties are necessary for states’ inspection laws. The clause states that the proceeds resulting from duties and imposts go to the United States Treasury. Finally, it gives Congress the authority to change laws related to this clause.

In restricting the states' ability to tax commerce, the Import–Export Clause complements Congress's economic powers under Article I to raise revenue and to regulate commerce among the states, with Indian tribes, and with foreign nations. It is most likely that the Founders designed the clause to apply to foreign and domestic goods. James Madison was leery of allowing states to tax imports to protect native industries because such restrictions had proven harmful to commerce and state relations.

Early Supreme Court interpretations in cases such as *Brown v. Maryland* (1827) and *Almy v. California* (1861) affirmed the understanding that the clause applied to domestic and foreign imports and exports. In *Woodruff v. Parham* (1869), the Court held that the clause applied to foreign imports and exports only and reasoned that earlier cases were either wrong or correct under the "Dormant Commerce Clause" theory. Later cases clarified the definition of imports and exports for the purposes of state taxation. The Court's interpretation of the Import–Export Clause shifted again in *Michelin Tire Corp. v. Wages* (1976). The Court ruled that a nondiscriminatory state tax would be invalid if it (a) interfered with the ability of the federal government to regulate foreign commerce uniformly, (b) gave revenue derived from imports to the states instead of the federal government, or (c) risked interstate disharmony. Recently, Justice Clarence Thomas argued that the Court's jurisprudence on the Import–Export Clause has been incorrect since *Woodruff* and that the clause applies to both domestic and foreign imports and exports.



Check Understanding

The idea behind the "Dormant Commerce Clause" theory is that Congress's power to regulate commerce among the states, with nations, and with Indian tribes implies a restriction on state power.



Discussion Question

How does the Import–Export Clause complement the powers granted to Congress in Article I of the Constitution? (The Constitution gave Congress the power to regulate commerce among the states, between the United States and other countries, and with Indian tribes. Congress also may levy taxes on goods or services, provided these taxes align with the requirements of Article I. To prevent the states from encroaching on Congress's power and from creating barriers to trade, the Framers prohibited the states from levying taxes on imports and exports.)

Compact Clause – Article I, Section 10, Clause 3

Essay by Michael S. Greve (pp. 178–179)

The purpose of the Compact Clause was to ensure that the federal government, not individual states, would have authority over foreign and interstate affairs. James

Madison inspired portions of the Compact Clause. Part of Madison’s agenda for the Constitutional Convention was a proposal to empower Congress to veto any state law. The Convention rejected this proposal three times. Instead, state laws would be subject to the Supremacy Clause: State laws are in effect unless they are inconsistent with federal law or the Constitution. Certain classes of state activity that could threaten the Union or sister states would be prohibited except with the consent of Congress.

The Compact Clause prohibits a variety of activities that threaten the Constitution: state protectionism, standing armies, and warfare. It requires states to obtain permission from Congress to impose “duty of tonnage”; keep troops or warships if there is not a war currently in progress; enter into compacts (agreements) with other states or countries; or fight a war unless invaded. The prohibition on states’ charging duties of tonnage prevents state protectionism and protects Congress’s commerce power. Because standing armies were a grave threat to the new republic, the Constitution prohibits them on the state level. States may maintain militias but not a standing army. However, the most significant portion of the clause concerns the ability of states to enter into agreements, both written and verbal, with foreign nations or other states.

Most constitutional litigation on the clause focuses on the phrase regarding agreements and compacts with other states or countries. The Supreme Court has ruled that the clause applies to a broad array of foreign compacts but has interpreted it to apply to a narrow class of state agreements. Furthermore, the Court has ruled that interstate agreements need the approval of Congress if they violate the supremacy of the federal government, which has functionally deprived the clause of much of its force.



Active Reading

What activities by the states does the Compact Clause expressly prohibit? (performing the following activities without the consent of Congress: levying taxes on tonnage, keeping troops during peacetime, keeping warships during peacetime, making a compact or agreement with another state or country, and entering into a war)



Check Understanding

Though the clause clearly prohibits states from forming compacts without the consent of Congress, it is not clear that Congress must consent prior to the formation of the compact. **Ask:** Based on what you have read, do you think that Congress needs to consent before or after the agreement is formed? (Reasoning will vary. Students may argue that because the purpose of the clause is to prevent states from engaging in behavior that would harm other states or the Union, congressional consent should be required before the agreement. On the other hand, some may argue that requiring consent prior to the agreement may be unproductive because it would be difficult to understand the full scope of the agreement until after the agreement is formed.)



Check Understanding

Have students complete the following assessment to check their understanding of Lesson 14, Part 2. Review any material for questions they have missed.

Multiple Choice: Circle the correct response.

1. The Obligation of Contracts Clause extended to the states a prohibition that was already in effect in the
 - a. **Northwest Territory**
 - b. Parliament
 - c. state constitution of Virginia
 - d. Articles of Confederation

2. Which court case first concluded that the imports and exports referred to in the Import-Export Clause referred only to foreign imports and exports?
 - a. **Woodruff v. Parham (1869)**
 - b. *Brown v. Maryland* (1827)
 - c. *Low v. Austin* (1879)
 - d. *Michelin Tire Corp. v. Wages* (1976)

3. The Compact Clause prohibits the states from engaging in which of the following?
 - a. standing armies
 - b. warfare
 - c. state protectionism
 - d. **all of the above**

Fill in the blank: Write the correct word or words in each blank.

1. The Import-Export Clause restricts the _____ power to tax commerce, thereby strengthening _____ Commerce power. **(States', Congress's)**

2. In the antebellum period, the Obligation of Contracts Clause was the only open-ended federal constitutional guarantee that applied to the _____. **(states)**

3. The Framers were more concerned about _____ ex post facto laws than _____ ex post facto laws in the federal government. **(criminal, civil)**

Short Answer: Write out your answer to each question.

1. Why did the Framers deny states the ability to form treaties? **(They wanted the Constitution to centralize much, if not all, power over foreign affairs.)**

2. Why did the elimination of the states' power to coin money cause controversy? **(The power to make money traditionally signaled political sovereignty, and taking away this power signaled a shift in power from the states to the federal government.)**

True / False: Indicate whether each statement is true or false.

1. Adding a prohibition against ex post facto laws was an afterthought at the Constitutional Convention. **(False. Opposition to ex post facto laws was a bedrock principle among the Framers.)**
2. The Compact Clause and the Import-Export Clause are qualified prohibitions on state activity. **(True)**
3. There are many ways to enter into international obligations. **(False. It appears that the Compact Clause is exclusive and provides the only route by which to enter into treaties with foreign countries.)**

Part 3:

The Civil War, the Fourteenth Amendment, and the Federal Government's Relationship with the States

State Action

Amendment XIV, Section 1

Privileges or Immunities Clause

Amendment XIV, Section 1

Due Process Clause

Amendment XIV, Section 1

Equal Protection Clause

Amendment XIV, Section 1

Apportionment of Representatives

Amendment XIV, Section 2

Disqualification for Rebellion

Amendment XIV, Section 3

Debts Incurred During Rebellion

Amendment XIV, Section 4

Enforcement Clause

Amendment XIV, Section 5

Unit 5

In the United States Civil War, several Southern states attempted to secede from the Union in order to protect their local institution of human slavery (see Lesson 19 on Slavery and the Constitution). The resolution of the war had important significance for the relationship between the federal government and the states, especially as it had to do with the protection of civil rights.

By passing the Civil Rights Act of 1866, Congress attempted to overturn the “black codes” that Southern states implemented to curtail the civil rights of freed slaves. The act proclaimed that all citizens are entitled to the same rights and protections of the rule of law. Andrew Johnson vetoed this act, explaining that Congress did not have authority to enact such legislation. Congress responded with a constitutional amendment. The Fourteenth Amendment constitutionalizes the protections of the Civil Rights Act of 1866 and empowers Congress to enforce the amendment with appropriate legislation.

State Action – Amendment XIV, Section 1*Essay by Patrick Kelley (pp. 386–390)*

The State Action Clause of the Fourteenth Amendment prohibits the states from abridging the privileges and immunities of citizens; depriving anyone of life, liberty, or property without due process of law; or denying any person in their jurisdictions the equal protection of the law. Two questions arise concerning the application of this clause: Do these limitations apply to states and those acting under state authority, and is Congress's power to enforce the amendment aimed at states and state actors alone? Under the original understanding of the clause, Section 1 limits the behavior of states and their actors, and Section 5 is directed at the activities of states and their actors.

The historical context of the clause helps explain its meaning and purpose. Prior to the Fourteenth Amendment, Congress passed the Civil Rights Act of 1866 to overturn the “black codes” that Southern states implemented to curtail the civil rights of freed slaves. The act proclaimed that all citizens are entitled to the same rights. President Andrew Johnson vetoed this act, explaining that Congress did not have authority to enact such legislation. Congress responded with the Fourteenth Amendment to constitutionalize the Civil Rights Act of 1866. Sections 1 and 5 of the Fourteenth Amendment were designed to provide a solid constitutional base for the legislation, and Section 1 embedded the essential proscriptions of the act in the Constitution itself, therefore making it impossible for future Congresses to overturn the protections.

Despite the Fourteenth Amendment's history, some modern interpreters argue that Section 1 recognizes a broad, general, constitutional principle of equality. This interpretation eliminates the distinction between the behavior of private individuals and that of public actors because, in certain circumstances, private behavior that undermines equality could be considered a state action.

Such an interpretation is too broad, as the debate on a proposed constitutional amendment prior to the Fourteenth Amendment indicates. Under the proposed amendment, Congress would have had the power to make all laws necessary and proper to secure to all persons in every state equal protection of their rights to life, liberty, and property. Congress rejected this broad language because the wording could have been interpreted to give Congress a plenary power to regulate the actions of private individuals and thereby supplant state civil and criminal law. Considering this proposed language and the final language of Sections 1 and 5, the provisions limit only the actions of states or those acting under state authority.

There is no indication that Section 5 of the Fourteenth Amendment was meant to grant broad power to Congress to regulate private behavior. In the *Civil Rights Cases* (1883), the Supreme Court ruled that the Civil Rights Act of 1875 was unconstitutional because Congress did not have authority under the Fourteenth Amendment to regulate the behavior of private individuals.

Unit 5

In *United States v. Guest* (1966), though, the Supreme Court ruled that Congress had authority under Section 5 to regulate the actions of private individuals who conspired with public actors to deprive individuals of rights protected under Section 1. Two concurring opinions suggested that Congress could use its Section 5 power more broadly to regulate purely private behavior. In *United States v. Morrison* (2000), however, the Court returned to the *Civil Rights Cases* ruling that Section 1 applies to states or state actors and not to the conduct of private individuals.

The Supreme Court has consistently held that state action is necessary to trigger judicial enforcement of Section 1 of the Fourteenth Amendment. There are certain limited cases wherein the action of a private individual can be classified as a state action. These cases fall into one of two categories: (a) cases in which private entities are performing public functions or exercising powers traditionally reserved to the state or (b) cases in which the government becomes intertwined with a private entity so that the private entity functionally acts as the government.



Active Reading

Ask: What three specific actions does Section 1 of the Fourteenth Amendment prohibit? (It prevents states from abridging the privileges and immunities of citizens; depriving anyone of life, liberty, or property without due process of law; or denying any person in their jurisdictions the equal protection of the law.)



Make An Inference

Ask: Who is a state actor? (someone who acts on behalf of a state) Why is it important to determine who is a state actor? (because the Constitution allows Congress to regulate the behavior of state officials but not private individuals) Why does it matter whether the federal government can regulate private activity or only state actor activity? (Congress does not exercise the full legislative power. It exercises only the set of powers herein granted. States have a tremendous ability to legislate on matters of health, safety, and morals and the general welfare. There is a difference between bad behavior on a private level and bad behavior on the state level. For instance, the remedy for the bad behavior of a private citizen can include suing that person or moving away. In part because of sovereign immunity, there is no comparable remedy for an unjust state executive, legislature, or judiciary.)

Privileges or Immunities Clause — Amendment XIV, Section 1

Essay by Calvin Massey (pp. 390–394)

The Privileges or Immunities Clause prevents individual states from creating or enforcing laws that violate “the privileges or immunities of citizens of the United States.” There are three main theories concerning the original meaning of this section of the Constitution. The main points of division are whether the clause mandates that states apply their laws equally to all citizens or whether it requires state laws to have certain substantive content. The substantive view reads the clause to mandate certain content in state law—a substantive package of entitlements. The content of privileges and immunities includes either (1) all rights in the Articles (such as habeas corpus and protections against ex post facto laws) and the rights guaranteed in Amendments I–VIII or (2) the natural rights of liberty and property possessed by all individuals in a free government.

Those who interpret the Privileges or Immunities Clause to mean that states must apply their laws (whatever their content) equally to all citizens ground their interpretation in the text and history of the amendment. First, under the Citizenship Clause, a citizen of a nation is a citizen of a state; therefore, the privileges and immunities of national citizenship include those of state citizenship. Second, because it uses the word “citizens” (rather than the term “persons” from the Due Process and Equal Protection Clauses), the clause is best understood to reference a group of individuals, not a set of rights. Third, Members of the Thirty-ninth Congress objected to state legislatures’ practice of discriminating against *classes* of citizens, granting one class more rights than another. Fourth, the Privileges and Immunities Clause of Article IV informs the understanding of the Privileges or Immunities Clause of Amendment XIV. The drafters of the amendment understood the Article IV clause to ensure that states treated citizens of other states the same as they did their own citizens. Finally, Members of Congress invoked the Privileges or Immunities Clause to justify the Civil Rights Act of 1875, which prohibited those who had a duty to serve the public indiscriminately from privately discriminating against individuals.

Another theory about the clause is that the phrase “privileges or immunities” refers to the rights outlined in the Constitution and the Bill of Rights in particular. Proponents of this view cite the text and the comments of Representative John A. Bingham, who often declared that the privileges or immunities of citizenship are the first eight amendments to the Constitution. They argue that framers of the clause designed it to make the Bill of Rights and all other rights associated with citizenship binding on the states. Though there is evidence for this position, Congress approved several constitutions of reconstructed states that contained provisions contrary to the federal Bill of Rights.

Unit 5

A third interpretation argues that the clause was designed to secure certain natural rights of property and liberty. This reading of the clause is consistent with Justice Bushrod Washington's interpretation of the Privileges and Immunities Clause of Article IV in *Corfield v. Coryell* (1823). Justice Washington argued that privileges and immunities consist of fundamental rights and liberties that belong to individuals by nature. Thus, like the Privileges and Immunities Clause in Article IV and the Civil Rights Act of 1866, the Privileges or Immunities Clause secures certain natural rights of all citizens, regardless of race.

In the *Slaughter-House Cases* (1873), the Supreme Court concluded that the privileges or immunities of citizenship were substantive but gutted the clause of most of its content. The substance did not include either natural rights or provisions contained in the Bill of Rights. The Court argued that the clause did not empower the federal government to protect civil rights, a responsibility traditionally entrusted to the states. Following this decision, the Privileges or Immunities Clause became a dead letter. The Court interpreted the Equal Protection Clause to include the equality function and the Due Process Clause to provide the substantive protections once theorized to be part of the Privileges or Immunities Clause of the Fourteenth Amendment.



Check Understanding

Point out the two clauses in the Constitution that refer to privileges and immunities of citizenship: the Privileges and Immunities Clause of Article IV and the Privileges or Immunities Clause of Amendment XIV. Remind students to note the difference between the Privileges and Immunities Clause of Article IV and the Privileges or Immunities Clause in Amendment XIV. **Ask:** *What was the purpose of the Privileges and Immunities Clause?* (The Privileges and Immunities Clause created common citizenship and ensured that states do not discriminate against citizens of other states in judicial processes and economic activities.)



Active Reading

Ask: *How did the Supreme Court's decision in the *Slaughter-House Cases* gut the substantive meaning of the Privileges or Immunities Clause and what was the effect of the decision on the Equal Protection and Due Process Clause?* (In the *Slaughter-House Cases* (1873), the Supreme Court concluded that the privileges or immunities of citizenship were substantive, but the substance did not include either natural rights or provisions contained in the Bill of Rights. After the *Slaughter-House Cases*, the Court interpreted the Equal Protection Clause to include the equality function and the Due Process Clause to provide the substantive protections once theorized to be part of the Privileges or Immunities Clause of the Fourteenth Amendment.)



Check Understanding

Write the following on the board or use it to prepare a handout for students: Ask students to read the Privileges or Immunities section in the text and complete the graphic organizer. They may work independently or with a partner. Review the answers with students, and encourage them to share their responses. See sample layout available in appendix.

Sample completed chart:

Theories Regarding the Original Meaning of the Privileges or Immunities Clause

Theory #1

Ensure that state laws (no matter the content) applied equally to all citizens.

Supporting Points

- Citizenship Clause references state and United States citizens, so state citizens have the privileges and immunities of United States citizens.
- The use of the word “citizens” suggests the clause was developed to protect the rights of individuals.
- Drafters were influenced by the Privileges and Immunities Clause. Its purpose was to ensure that states treated those from other states as they would their own citizens.
- The clause was used to develop the Civil Rights Act of 1875, which was aimed at stopping racial discrimination.

Theory #2

Privileges and immunities are the rights in the Constitution (namely the Bill of Rights)

Supporting Points

- This was the view favored by John A. Bingham
- Bingham said the privileges and immunities were outlined in the Bill of Rights.
- The theory is consistent with the anti-slavery view of the Constitution.
- The text of the clause itself suggests privileges or immunities refers to a set of substantive rights.

Theory #3

The clause grants natural rights such as liberty and property ownership.

Supporting Points

- Justice Bushrod Washington stated that the Privileges and Immunities Clause referred to natural rights.
- Congress developed the 1866 Civil Rights Act to ensure that all persons would have several basic rights.
- This interpretation is also consistent with the interpretation of Article IV’s Privileges and Immunities Clause.

Due Process Clause — Amendment XIV, Section 1

Essay by James W. Ely, Jr. (pp. 394–398)

The language of the Due Process Clause of the Fourteenth Amendment is almost identical to the language of the Due Process Clause of the Fifth Amendment. Both state that persons cannot be deprived of their “life, liberty, or property without due process of law.”

The modern interpretation of the Due Process Clauses of the Fifth and Fourteenth Amendments understands them to impose certain substantive and procedural due process requirements on state and federal governments. As will be discussed in Lesson 17, the original meaning of the Due Process Clause limits the substance of executive and judicial actions by requiring them to be grounded in law and prevents the legislature from prescribing novel judicial procedures for the deprivation of life, liberty, or property. The term “substantive due process” in modern discourse typically refers to specific content limitations on legislation.

Some originalist defenders of substantive due process cite Sir Edward Coke’s understanding that the “law of the land” in the Magna Carta refers to procedural and substantive protections. They further argue that this understanding was incorporated into many state constitutions. Originalist opponents of the theory of substantive due process counter that limitations on monarchs do not translate into limitations on legislatures and that other clauses of the Constitution specifically address substantive rights. Therefore, critics conclude, due process of law requires government to act according to rational modes of procedure (“due process”) and pursuant to valid legal authorizations (“of law”).

Prior to the Civil War, state courts dealt more with issues of the Due Process Clause of the Fifth Amendment than the Supreme Court did. Some state courts interpreted the clause to require certain procedures; a few courts interpreted substantive requirements.

The Supreme Court initially interpreted the Due Process Clause of the Fourteenth Amendment narrowly, arguing that it performed the same function as the Due Process Clause of the Fifth Amendment and that it did not incorporate the Bill of Rights against the states. Some judges, though, argued that the clauses protected certain substantive rights, such as the liberty of contract. The Court then began to embrace the idea that the Due Process Clause protected certain fundamental liberties, in particular economic liberties. For instance, in *Lochner v. New York* (1905), the Court held that a state law infringing on liberty of contract violated the Due Process Clause.

After the New Deal, the Supreme Court transformed the interpretation of the Due Process Clause of the Fourteenth Amendment. The Court no longer invoked the clause to review economic legislation. Instead, it invoked the clause to safeguard controversial non-economic rights such as the right to privacy.

The Court used the Due Process Clause to incorporate various sections of the Bill of Rights against the states. This collection of cases over several years created the “selective incorporation doctrine,” which is selective because the Second, Third, and parts of the Fifth and Seventh Amendments were not included in the portions of the Bill of Rights that were incorporated against the states. With this doctrine, the Court has incorporated many of the freedoms in the Bill of Rights and has found other rights not in the Constitution. This doctrine remains controversial.



Before you Read

Ask: Have you ever heard of the phrase “due process of law” before? What do you think it means? (Answers will vary. Many students have likely heard the phrase and may state that due process of law refers to the legal procedures put in place both by state authorities and by the federal government.)



Active Reading

Ask: What is the selective incorporation doctrine for the Due Process Clause? (Under the selective incorporation doctrine, portions of the Bill of Rights apply to the states, but other parts do not. The Second, Third, and parts of the Fifth and Seventh Amendments were not included in this doctrine.) Ask: Why is it controversial? (The doctrine is controversial because it is unclear what criteria judges use to determine which amendments are incorporated, and judges’ decisions appear to be based on their policy preferences.)

Unit 5

Equal Protection Clause — Amendment XIV, Section 1

Essay by David Smolin (pp. 398–404)

The Equal Protection Clause of the Fourteenth Amendment prohibits any state from denying an individual “equal protection of the laws.” As David Smolin explains, the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause form a coherent triad. A state’s legislature may not deny to any citizen within its jurisdiction any privilege or immunity (however defined). Once a law is validly passed, the state or its agents may not arbitrarily enforce it against any person within the state’s jurisdiction without violating the Equal Protection Clause. Finally, every person accused of violating a law enjoys the full panoply of procedural rights before the courts of the state.

The original understanding of the Equal Protection Clause is much narrower than the modern understanding that emerges from the Supreme Court’s decision in *Brown v. Board of Education* (1954). Understanding the original meaning of the clause centers on two questions: how far and in what relation to rights did the Framers intend equality to apply, and what does it mean to treat persons equally?

Considering the text and history of the Fourteenth Amendment, the framers of the amendment intended equal protection to mean that individuals have the “same right” to make contracts, sue, give evidence, sell property, and have the benefit of legal proceedings, among other things. They recognized the importance of federalism but designed the amendment to ensure federal protection of the fundamental rights flowing from citizenship and personhood. But there is a difference between civil, political, and social equality, and the amendment was designed to protect civil equality. (The Fifteenth Amendment’s guarantee of the right to vote was part of political equality.) Moreover, though the text of the clause was certainly designed to protect newly freed slaves, it is not limited to racial classifications. Union loyalists in the South would also receive the protection of the Equal Protection Clause. This decision reflected the framers’ plan to protect other groups (such as Union loyalists in the South) and their understanding that humans are equal and that all therefore possess certain basic human rights.

When the Supreme Court gutted the Privileges or Immunities Clause of its meaning in the *Slaughter-House Cases* (1873), the substantive meaning of that clause was transferred into the Due Process and Equal Protection Clauses. In *Brown*, the Court relied on the Equal Protection Clause to invalidate segregated public schools, arguing that “separate but equal” violated the Equal Protection Clause.

Whether or not the *Brown* ruling is compatible with the original understanding of the Framers’ intent is the subject of much debate. Some point to the Republicans’ attempt in 1866 to desegregate education and cite the understanding that education was considered a civil right, not a political or social right, as evidence that the ruling is consistent with the original meaning. Furthermore, segregation was part of the black codes that the Civil Rights Act of 1866 (and therefore the Fourteenth Amendment) sought to remedy. The framers of the amendment presumed equal treatment to mean the same *treatment* of rights of personhood and citizens. Although it is possible to read the clause as not commanding integration, it was not intended to countenance legally enforced segregation and certainly not the white supremacist racism that was systematically and legally enforced throughout the South from 1896–1954.

Since *Brown*, the Supreme Court has developed a system of tests to evaluate violations of the Equal Protection Clause, including racial and non-racial classifications. Indeed, valid laws make distinctions between persons, but laws are problematic if they do not proscribe the same rule for all of those who are similarly situated. Racial classifications were evaluated under a “strict scrutiny” review and subject to a strict means–ends test. The Court evaluated the government’s interest in establishing the classification, the end that it is designed to achieve, and whether there is another way to achieve that end without using race-based classifications. Racial classification and its corollaries are subject to strict scrutiny. Although the unequal treatment that is part of affirmative action would appear to violate the clause, the Supreme Court has upheld this practice in some instances.

Other classifications are presumed to be constitutional. When the Court evaluates these other, non-racial classifications, it determines only whether there is a rational relationship between the classification and the government's interest. Beginning in the 1970s, some have pushed for an intermediate scrutiny to evaluate classifications based on sex or legitimacy. The Court has thus far refused to extend heightened scrutiny for many other distinctions and it is unclear how, if the court were to use a heightened standard of scrutiny, it would determine which classifications receive this heightened scrutiny.



Discussion Question

On page 399, David Smolin refers to the Privileges or Immunities Clause, the Equal Protection Clause, and the Due Process Clause as a "coherent triad." **How do these clauses work together?** (A state's legislature could not deny to any citizen within its jurisdiction any privilege or immunity, however defined. Once a law was validly passed, the state or its agents could not enforce it arbitrarily against any person within the state's jurisdiction without violating the Equal Protection Clause. Finally, every person accused of violating a law would enjoy the full panoply of procedural rights before the courts of the state.)



Research It

Have students research *Brown v. Board of Education* (1945). **What was the reasoning of the Court? How did the Equal Protection Clause change after the case? Is the Court's reasoning based on the original understanding of the clause? If not, how would you rewrite the Court's opinion to reflect the original understanding?**

Unit 5

Apportionment of Representatives — Amendment XIV, Section 2

Essay by Paul Moreno (pp. 404–406)

The Fourteenth Amendment addresses several key and contentious post-Civil War issues relating to representation in Congress, the political status of high-ranking rebels, and the debts of the United States and Confederate States. Section 2 of the amendment concerns representation in Congress. Specifically, representation will be apportioned according to the whole number of persons in each state. Under the Three-fifths Clause of Article I, only three-fifths of the slave population would count toward representation in Congress. With the slaves now free, the South stood to gain many new Members of Congress, but Section 2 of the Fourteenth Amendment was quite controversial in the South because of its implications for enfranchisement.

The states determined qualifications for voting, and few states—even Northern states—allowed free blacks to vote. Therefore, the clause did not compel states to enfranchise blacks, but it was designed to encourage Southern states to do so. It also allowed states to disenfranchise those who participated in the rebellion or other crime, but it did not mandate the disenfranchisement.

Once the Fifteenth Amendment was passed, the Apportionment of Representatives Clause became largely unnecessary. However, the Achilles’ heel of Reconstruction was that Congress did not enforce either the Fifteenth Amendment or Section 2 of the Fourteenth Amendment when states began to disenfranchise blacks. As a result, blacks could not protect themselves through the political process.

Section 2 of the Fourteenth Amendment would still apply to future instances of rebellion or insurrection within the country. Since the clause allows disenfranchisement for participation in rebellion or other crime, states may disenfranchise convicted felons.



Active Reading

Point out the use of the word “apportioned” in Section 2 of the Fourteenth Amendment (page 404). Read the sentence containing the word aloud to students. *Ask: What do you think the word “apportioned” means?* (assigned, given out, distributed)



Active Reading

Ask: What was the Framers’ reason for developing Section 2 of the Fourteenth Amendment? (They wanted to encourage Southern states to enfranchise blacks, but they did not want to require them to do so, since many state laws, including Northern state laws, prevented blacks from voting.)



Check Understanding

What does the Constitution say about qualifications for voting? Who selects members of the House, members of the Senate, and the Executive? What are the requirements for those electors? (Initially, the House of Representatives was the only part of the government directly elected by the people. The Constitution made no specific qualifications for voters. Instead, the states set the qualifications for voting for members of the House. State legislatures selected both Senators and electors for the Electoral College. Under the Seventeenth Amendment, Senators are selected through popular vote, but state legislatures determine the qualifications for voting. The Electoral College selects the President. Initially, state legislatures would select the electors. Now, popular vote for President determines which electors are sent to the Electoral College. Nevertheless, states determine the qualifications for voting.)

Disqualification for Rebellion — Amendment XIV, Section 3

Essay by Paul Moreno (p. 406)

The Disqualification for Rebellion Clause concerns the political status of high-ranking rebels—specifically, those who previously had taken an oath to support the Constitution but then participated in a rebellion or insurrection or assisted individuals engaged in such activities. The clause forbids those individuals from serving in certain offices. The Disqualification for Rebellion Clause was the most controversial section of the Fourteenth Amendment because it appeared to be vindictive and to encroach on the President's pardon power. Additionally, it made it difficult for Southern states to ratify their constitutions (especially in time for the election of 1868). While the first version of the draft disqualified those who aided the Confederacy until 1870, the revised version was less severe but lacked a time limit.

Eventually, Congress lifted the disqualification for many individuals, including Members of Congress, judicial officers, and military officers. By 1898, Congress had removed all disqualifications for disloyal conduct, but Section 3 of the Fourteenth Amendment is still in operation and could be applied again to future insurrections or rebellions.



Check Understanding

Remind the students that the President has the power to pardon people who have been convicted of a crime. *Ask: Why did this clause appear to intrude on presidential pardons?* (Article II gives the President the power to pardon. President Washington, for instance, used this power to pardon rebels. But the Fourteenth Amendment forbids those who participated in a rebellion from serving in office. Congress, by two-thirds vote, can remove this disability.)



Active Reading

Ask: What offices are individuals who supported or engaged in a rebellion prevented from holding under the Disqualification for Rebellion Clause of the Fourteenth Amendment? (any civil or military office within the state or federal government, including Senator, Representative, President, and Vice President)

Debts Incurred During Rebellion — Amendment XIV, Section 4

Essay by Paul Moreno (pp. 406–407)

The Debts Incurred During Rebellion Clause declared the validity of the public debt of the United States authorized by law. It clarified that neither the United States nor any state would be responsible for debts incurred to aid the rebellion. Moreover, former slave owners may not claim reimbursement for the loss of slaves. Section 4 of the amendment generated little controversy, except from some former slave owners in loyal slave states who thought they should be compensated for their hardship.

In applying this clause, federal courts decided that no contracts involving Confederate bonds could be enforced and that courts should hesitate to recognize the contracts at all. Contracts involving Confederate currency, on the other hand, could be enforced. The issue of repudiating debt emerged again when Congress took the United States off the gold standard. The Court argued that Congress did not have authority to refuse to repay the bonds in gold, but the damage to bondholders was minimal.



Active Reading

Ask: Why did federal courts decide that contracts involving Confederate currency should be enforceable? (People still had to conduct business during the Civil War, and the only currency available in the rebel states at the time was Confederate currency. Therefore, its use in contracts was a matter of necessity rather than an open declaration of an individual's participation in and support for the rebellion.)

Enforcement Clause — Amendment XIV, Section 5

Essay by Roger Clegg (pp. 407–409)

The Enforcement Clause of the Fourteenth Amendment delegates to Congress the power to pass legislation to enforce the first four sections of the amendment. The Enforcement Clause serves the same purpose as the Necessary and Proper Clause, and similar enforcement clauses are in the Thirteenth, Fifteenth, and Nineteenth Amendments.

The Enforcement Clause grants a limited power to Congress. Legislation may be directed at states and individuals acting under state authority. State actions must be an intentional violation of the Fourteenth Amendment. In the *Civil Rights Cases* (1883), the Supreme Court ruled that Congress could not use its powers to prevent private individuals from acting in a discriminatory manner. Legislation must remedy or prevent some violation of a provision of the Fourteenth Amendment; this power does not justify legislation to remedy violations of other amendments, such as the First Amendment.

The Court ruled that Congress may ban categories of activities that generally violate the amendment. For instance, Congress banned literacy tests for voting, even though it is possible to use them in a constitutional manner. The Court has also held that Congress's legislation must be tailored to address the infringement.



Check Understanding

The text compares the Necessary and Proper Clause of Article I, Section 8 to the Enforcement Clause of the Fourteenth Amendment. Have students think back to the Necessary and Proper Clause. **Ask:** What is the purpose of the clause? (It gives Congress the power to make the laws appropriate to carry out the rest of its powers.) **Ask:** How is the purpose of the Necessary and Proper Clause similar to the purpose of the Enforcement Clause of the

Fourteenth Amendment? (Both clauses give Congress the power to pass laws to further an already established end. In the case of the Necessary and Proper Clause, the ends are those powers delegated in the Constitution. In the case of Section 5 of the Fourteenth Amendment, the ends are those listed within the Fourteenth Amendment. Neither of these clauses was designed to be a blank check for Congress to make whatever law it desires.)



Work in Groups

Break up the students into groups. Have each group focus on a different clause of the Fourteenth Amendment. Using the discussion in the *Heritage Guide to the Constitution* and the recommended resources, have students write a paper comparing the original understanding of the provisions of the Fourteenth Amendment with the modern Supreme Court's interpretation of those provisions. Have students share their reports with the class.



Check Understanding

Have students complete the following assessment to check their understanding of Lesson 14, Part 3. Review any material for questions they have missed.

Fill in the blank: Write the correct word or words in each blank.

1. The abolition of slavery increased the _____ of former slave states in the House of Representatives. **(number of representatives)**
2. One of the main motivations for the creation of the Civil Rights Act of 1866 was to ban the _____ introduced in Southern states. **(black codes)**
3. After the *Slaughter-House Cases* of 1873 gutted _____, its protections were subsumed under the Equal Protection clause and the Due Process Clause. **(the Privileges or Immunities Clause)**
4. With respect to the Due Process Clause of the Fourteenth Amendment, the Supreme Court has decided that some parts of the Bill of Rights are incorporated against the states under what is known as the _____. **(selective incorporation doctrine)**
5. Congress drafted the Fourteenth Amendment and sent it to the states for approval in _____; it was added to the Constitution in _____. **(1866, 1868)**
6. Because a citizen of the nation is a citizen of a state, the privileges and immunities of national citizenship necessarily include the privileges or immunities of _____. **(state citizenship)**

7. Modern law interprets the Fifth and Fourteenth Amendments to impose the same substantive due process and procedural due process requirements on the _____ and _____ governments. **(federal, state)**

Short Answer: Write out your answer to each question.

1. Which President vetoed the Civil Rights Act of 1866? **(President Andrew Johnson)**
2. What did the Civil Rights Act of 1875 mandate? **(equal access to public accommodations, common carriers, and places of amusement)**
3. What was a central focus of the Thirty-ninth Congress? **(to protect newly emancipated slaves from discriminatory state laws)**
4. The Supreme Court's decision in the *Slaughter-House Cases* (1873) did what to the Privileges or Immunities Clause? **(the decision stripped the clause of meaningful substance)**
5. When it first appeared, what was the meaning of the phrase "due process of law"? **(It meant that judgments could issue only when the defendant was personally given the opportunity to appear in court pursuant to an appropriate writ—i.e., was served process.)**

True / False: Indicate whether each statement is true or false.

1. Most commentators agree that the intended scope of the Equal Protection Clause was applied to all actions by the government as a command to treat persons equally. **(False. While this is the modern constitutional view, most commentators agree that the intended scope was much narrower.)**
2. The language of the Equal Protection Clause protects only Blacks. **(False. The language is not race-specific and is designed to protect all persons.)**
3. Although Amendment XIV, Section 2 allowed for disenfranchisement of persons who had engaged in the rebellion, none of them were denied the right to vote on those grounds. **(True)**
4. The only objection to the Debts Incurred During Rebellion Clause of the Fourteenth Amendment was by some slave owners who thought they should be compensated for the loss of slaves. **(True)**
5. There is no indication that state legislatures that ratified the Fourteenth Amendment would have understood Section 5 as a broad delegation of power to Congress to regulate private behavior. **(True)**