Adamson v. California (1947).

The Frankfurter-Black debate over what the Fourteenth Amendment protects and the scope and breadth of this amendment. This lesson is intended to complement "Lessons 21-22; and 25-28 (though 32-33 could also apply)" in *We the People: The Citizen and the Constitution.* This is merely a tool and not meant to direct any teacher to a particular lesson plan. What follows is a general overview of the fourteenth Amendment in Terms of how it has been reasoned in the past (including major cases related to the Fourteenth Amendment), a quick brief of the *Adamson* case, web sites to be utilized can be found in the *We the People* text and case law can also be found in the Patrick text, *The Supreme Court Of The United States.* Each of the cases listed below are important and one may want to have students brief the cases and discuss them in context to the subject.

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OVERVIEW

Beyond the scope of this lesson is the well-known knowledge that the Constitution and the Bill of Rights were only binding upon the national government. Additionally Jefferson's cmplaint regarding the judiciary (in correspondence to Madison) and the Marshall Court's judicial review landmark cases are also outside our boundaries.

What is of interest to our lesson is the meaning of the Fourteenth Amendment. The members of the Congress who proposed and debated this amendment claimed the legislation fulfilled Madison's ideals in his proposal to the first Fedral Congress that "No State shall infringe on the equal rights of the conscience, nor the freedom of speech, or of the press, nor the right to trial by jury in criminal cases." The proposal was voted down by the Congress, but the proponents of the Fourteenth Amendment opined that this new piece of legislation was consistent with the original intent of the Constitution's primary author.

The claim of original intent is a vexing problem: Original intent may have "many fathers, varied offspring, and even mutate within the lifetime of the father." In the case of Madison it is very questionable whether he was the nationalist his speech leads one to believe (note the political party he was a member of). Additionally, although Madison championed an independent judiciary it is very dubious whether he would have taken keen delight in Judicial Review (*Marbury v. Madison (1803)*).

Looking at the case of the members of congress who pushed for the Fourteenth Amendment, we find another conundrum: The Fourteenth Amendment is rarely read in its entirety in our classrooms. Generally we confine ourselves to reading and understanding the amendment's force to be entirely "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and State wherein they reside…" as a mandate on the states to abide by the Constitution and the Bill of Rights in legislative relations with their respective citizens. Yet, sentence number two of Section Two may

very well modify the absolute nature of Section One when it identifies only males of having suffrage rights, and shortly later in the sentence is the reference to those who participated "in the rebellion." Was this amendment only directed to the freed black slaves and enforceable only in the states of the old confederacy? Was this amendment only concerned with political rights and not civil rights?

In *Plessy v. Ferguson (1896)* Justice Brown's reading of the majority decision against Plessy noted that the same Congress that passed the Fourteenth Amendment was the same Congress that instituted racial segregation in the District of Columbia.

Was that original Intent?

Yet there were others who saw that the Fourteenth Amendment enjoined state governmental actions to the Constitution in the protection of individual rights and liberties. In the late 19th century the strongest voice in this interpretation was Justice John Marshall Harlan (a former slave holder from Kentucky). In the *Civil Rights Cases* of 1883 (the cases that tested

the constitutionality of Sumner's *Civil Rights Act of 1875*), Harlan wrote a stinging attack on the majority's understanding that the Fourteenth amendment did not protect against individual invasion of individual rights', and that Congress was not invested by the Amendment to "invade" upon traditional State power to legislate for its subjects. Harlan strongly held that the Fourteenth Amendment **did** alter the balance between the national government and the governments of the states. Furthermore, Harlan reasoned that the Thirteenth Amendment taken in combination with the Fourteenth Amendment gave the national government the power to act against discrimination anywhere. In concluding his dissent Harlan posited that there was in fact no distinction between state and private action writing, "…innkeepers, theatre owners, and those who offered transport" were agents or instrumentalities of the State because they are charged with duties to the public, and are amenable … to government regulation." (Harlan quote taken from *Equal Protection: Rights and Liberties under the Law* by Francis Graham Lee, p. 24). Harlan's position here was quite

prophetic in two ways: a) Harlan opined that the majority decision in these cases opened the door to total disenfranchisement of black in the south; and b) Harlan's position and expectation of the national government's power to act was a foreshadowing of the Court's position in the later half of the 20th century.

Harlan's "activist" interpretation of the Fourteenth Amendment appeared in his lone dissent in the *Plessy* case. Harlan insisted that the Constitution was color-blind, there was no caste in the United States, that the separation of citizens based upon race was a badge of servitude and "wholly inconsistent with the guarantee given by the Constitution to each State of a republican form of government (see *Article IV; Section 4*) and may be stricken down by Congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land,…"

It wasn't until the third decade of the 20th century that the Fourteenth Amendment was scrutinized regarding its impact on the states to protect individual rights and liberties. With the Great Depression and FDR's "New Deal" there appeared to be a change

in the expectation many Americans and many states had of the national government. The socio-economic conditions of the times created a revolutionary approach to the role of the national government: perhaps the national government ought to be the protector of not only political rights, but also, economic and civil rights. Three cases in the 1930's signaled a change in how the national government would understand its role, and the Fourteenth Amendment was the foundation for that change. *Powel l v. Alabama (1932)* overturned the death penalty conviction of young black males accused of raping a white female. The court found that the due process clause of the Fourteenth Amendment had been violated. Chief Justice Hughes reasoned that due process required that persons accused of specific capital crimes be provided defense at state expense. In *Brown v. Mississippi (1936)* the Court again reversed a murder conviction. Although the defendants had confessed their guilt, evidence clearly showed the men had suffered torturous interrogation (repeated beatings, one was hung for a few moments). Again the Fourteenth Amendment due

process clause was applied; in this case Hughes wrote, “the State may abolish trial by jury…it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand.” (Lee, p. 29) The third case that illuminated a change in the courts approach to equal protection under the law was *United States v. Carolene Products (1938)*. The significance of this case lay in Justice Harlan Fiske Stone’s footnote 4 where he spelled out how the Court would wield its power of judicial review. In what Professor Lee calls a “judicial double standard” Stone made it clear that judicial scrutiny regarding property would be limited, compared to the scrutiny applied legislation that touched upon civil rights and liberties.

The heritage of the Hughes Court would be passed to the Warren Court and the elaboration of Stone’s footnote 4 statement that the Court would henceforth be the protector of “discrete and insular minorities” would be the torch of freedom for many and the bane of bitter vetch of judicial tyranny to others.

New definitions of freedoms would emerge and new solutions for equal protection would emerge. By the end of the Warren Court (1968) the Bill of Rights had been generally "nationalized" and large in-roads had been made regarding the total enfranchisement of African-Americans. Still there remained large questions regarding the Fourteenth Amendment: Had the court now taken the role of legislator with an agenda of its own? Who or what else was to be afforded the equal protection clause: What about religion in schools? What about public display of religious devotion? What about sexual discrimination? What about voting districts? What about abortion rights? What about homosexual rights? Where would it End?

Professor Francis Graham Lee opines in the final chapter of *Equal Protection: Rights and Liberties Under the Law* (p. 157-162) that the court system in general and the U.S. Supreme Court specifically is going through a process of "demystification". By demystification, Lee means that people have come to believe that when decisions come down from the judiciary, we are hearing

judges speak, not the Constitution. The call for judicial self-restraint and the charge of activist judges resonates this new attitude regarding the judiciary. "The shaping of the judicial branch of government has become one of the key battlegrounds in Washington politics, and one of the more important canvases on which a president can leave his image." (Lee, p. 158) The debate over equal rights and the role of the Fourteenth Amendment continues today and will continue into the future: How should the amendment be interpreted?