LESSON 2

The Incorporation Debate

Those reading the English language with the meaning which it ordinarily conveys, those conversant with the political and legal history of the concept of due process, those sensitive to the relations of the States to the central government...would hardly recognize the Fourteenth Amendment as a cover for the various explicit provisions of the first eight Amendments.

—FELIX FRANKFURTER

My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section...were intended...to make the Bill of Rights applicable to the states.

—HUGO BLACK

Critical Engagement Question
Which parts of the Bill of Rights (if any) should be incorporated to the states by the Fourteenth Amendment?

Overview
Does the Fourteenth Amendment require total incorporation of the Bill of Rights or rather, incorporation of only fundamental liberties? More than a century after the amendment's ratification, this debate continues. What is not debatable, however, is the fact that the Fourteenth Amendment has increased the power the federal government. In this process, citizens have become more reliant on the federal government.

Materials
Background Essay: The Incorporation Debate (** indicates grade twelve reading level; * indicates grade ten reading level.)
Handout A: Focus Quotation
Handout B: Amendments/Supreme Court Cases Matching
Answer Key

Objectives
Students will:
• identify the amendments that are currently incorporated to the states.
• understand the debate between “total” and “selective” incorporation.
• understand citizens’ responsibility to challenge the state when fundamental rights are infringed upon.
• evaluate the importance of Supreme Court cases in incorporating the Fourteenth Amendment.

Standards
NCHS: Era 3, Standard 3; Era 5, Standard 3
CCE: IA1, IB4, IIIC1
NCSS: Strands 2, 5, 6, and 10

Background/Homework
A. Have students read Background Essay: The Incorporation Debate.
B. Have students decide which (if any) of the first eight amendments they believe should be incorporated to the states. For each amendment, instruct them to write a brief explanation of their reasoning.

Anticipatory Activity [10 minutes]
A. Distribute or put up an overhead of Handout A: Focus Quotation. Call on volunteers to read their responses and have a brief class discussion.

Activity [25 minutes]
A. Distribute a copy of Handout B: Amendments/Supreme Court Cases Matching.
B. Allow students time to read the case descriptions and draw a line connecting the case on the left with the amendment it incorporates on the right.
C. Instruct students to place a check mark (✔) next to amendments that are fully or partially incorporated and an “X” next to those that have not been incorporated.

D. Use the Answer Key to go over correct answers.

Wrap-Up [10 minutes]

A. Have students compare the reality of selective incorporation with their answers from the homework assignment. Poll the class for each amendment, having students raise their hands if their response differed from the reality.

B. As a large group, discuss the following questions:
- Is total incorporation, selective incorporation, or no incorporation the best approach to the Fourteenth Amendment and the Bill of Rights?
- Why do you think the Second, Third, and Seventh Amendments have not been incorporated to the states?
- The Founders wrote the Bill of Rights to apply only to the national government. Why do you think this is? Didn’t they believe Bill of Rights protections were important?

Homework

A. Have students write one or two paragraphs in response to the question: Whose opinion, Justice Black’s or Justice Frankfurter’s, is more rooted in the Constitution?

B. Have students compile a timeline of incorporation cases including, but not limited to the cases in the Background Essay and Handout B. Have students write a paragraph that summarizes the definition of incorporation.

Extensions

A. Have students research the debate about Second Amendment incorporation and prepare for a class debate on the topic. Suggest they consider the opinions in the following cases: United States v. Cruikshank, (1876); Presser v. Illinois, (1886); Miller v. Texas (1894); United States v. Miller (1939); Lewis v. United States (1980).

B. Have students write a one-page essay defending one of the following theses:

The doctrine of incorporation did away with state sovereignty and would have appalled the Founders. Or,

The doctrine of incorporation forces state governments to better protect the rights of citizens and would have pleased the Founders.

Responsibilities Toolbox

Have students brainstorm a list of responsibilities of citizenship that go along with the incorporation of most of the Bill of Rights to the states. You might prompt them with the statements, “I am responsible for knowing…” and “I am responsible for doing…”

In addition to the ideas students generate, you may want to add:
- knowing what Bill of Rights protections apply at state level, and which do not.
- understanding incorporation’s impact on American identity.
- understanding the increased power of the federal government due to incorporation.