LAW WEEK 2016 CURRICULUM
Equality Under the Law: A Promise Kept?

I. BACKGROUND

Please read this section; it answers many questions presenters often have.

A. Introduction:

This year we are taking a slightly different approach to Law Week. Typically, we pick a fundamental legal right or protection, and focus in through the lens of a student. In past years, for example, we have looked at the interplay between the First Amendment and bullying; and we have examined how the Fourth Amendment informs a student's right to privacy in their lockers, backpacks, cellphones.

This year we take a step back from the specificity of those rights that involve our speech, our guns, or our private property to look at a broader Constitutional promise, that of **equality under the law.**

The reason for this is twofold. First, there has been so much in the public forum this past year that touches on our continuing efforts to realize that Constitutional promise, from the Black Lives Matter movement to the Supreme Court's marriage equality decision. In short, the discussion is timely, and understanding the legal frame of reference can help to advance that discussion.

Second, in this election year, the studies, polls and interviews on the ground reflect a great deal of disillusion in the younger population. It is difficult to feel engaged when one might rightly imagine that everything plays out on a rowdy political stage. Among other things, this program speaks to the role of Courts, and the mandate to rise above that partisan fray. The program will look at the Constitutional basis of equal protection under American law; the civil rights legislation of the middle of last century, and how the Court has interpreted and applied these laws, even when it was politically unpopular.

B. Procedure:

Each of you will be assigned a classroom at a specific high school. Based on prior feedback from presenters, we have requested certain classroom information from the teachers. Please refer to the details in your schedule regarding such things as classroom size, and student grade-level. The schedule also contains the contact information for your assigned teacher. Please reach out to the teacher prior to the presentation (this is a good time to find out any other specifics about the class that are of interest to you in preparing your presentation).

Most of you will present in pairs. Please coordinate with your co-presenter.

You should be prepared to spend some time at the beginning or end of your presentation discussing your career, and the practice of law.

C. <u>Preparation and Classroom Interaction</u>:

Be creative and have fun with your presentations. Once you touch base with the teacher, feel free to create whatever format you think will be most engaging.

The curriculum provided below is intentionally detailed in order to provide you with a breadth of historical background, factual scenarios, and legal research to enable you the flexibility and creativity to distill from it the presentation you wish to give. Suffice to say, you are neither required, nor even remotely expected, to use all of it in your presentations.

At the end of this packet, we have included an entirely ***optional*** outline for a particular classroom exercise, including hand-out materials. You can use it, or not. You can modify it, or come up with your own. You may well decide a classroom exercise is not how you wish to present or discuss the materials. It is up to you to decide.

We have also included some potential discussion points, at the end of this packet. Again, these are simply offered as ideas, and can be utilized, modified, or disregarded, as you and your co-presenter see fit.

Sometimes presenters stage mock "debates" between themselves; or treat the class as a jury, asking them to deliberate after each presenter makes an "oral argument" from opposing positions gleaned from the materials and case law. Some presenters prepare PowerPoint presentations; if you plan to use any kind of audio or visual presentation method, please be sure to discuss this with your assigned teacher in advance to ensure the classroom will be appropriately set up for, and conducive to, this kind of presentation.

On behalf of the Law Week Committee, we would like to thank all of you for participating in this year's Law Week, and we look forward to hearing about it!

Proceed and enjoy,

Suzanne Babb, SCBA Law Week Chair &
Rebecca Gallagher, Sonoma County Office of Education

II. THE ORIGINS OF EQUALITY UNDER THE LAW

A. The Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.
>
> IN CONGRESS July 4, 1776.

The concept of equal protection and equality in the United States is as old as the country itself. In the Declaration of Independence, Thomas Jefferson and the American colonists boldly announced the "self-evident" truth of human equality. Yet, the meaning of equality was neither obvious nor clearly defined.

At that time, many Americans owned slaves. James Madison and the other founding fathers drafted a national constitution that protected the slave trade and recognized the rights of slave owners.

The tension separating the aspirations of the Declaration of Independence from the reality of slavery ultimately erupted in the U.S. Civil War. The victory won by the North in that war ended the institution of slavery and commenced the struggle for Civil Rights that continues today. This struggle began with the ratification of the Thirteenth (1865), Fourteenth (1868), and Fifteenth (1870) Amendments during the “Reconstruction” period following the Civil War. Fifty years later, Congress ratified the Nineteenth Amendment (1920).

The Thirteenth Amendment abolished slavery, except when imposed as punishment for a crime. The Fifteenth Amendment did not expressly grant black citizens the right to vote, but prohibited state and federal governments from denying this right based on "race, color, or previous condition of servitude." Each amendment gave Congress the power to enforce its provisions with "appropriate legislation."

Although both of these amendments were important, the Fourteenth Amendment has had the greatest influence on the development of civil rights in the United States. It provides:

B. The 14th Amendment to the U.S. Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. Constitution, Article XIV, Section 1

The ratification of the Fourteenth Amendment occurred during a period in U.S. history known as the Reconstruction. There were some modest gains: a decrease in violence against blacks, more employment opportunities, even limited instances when blacks won political office.

But Reconstruction was not a substitute for civil rights, and the improvements realized by African Americans proved evanescent. By 1880 the North's passion for equality had atrophied. In the vacuum left by federal withdrawal, southern racism flourished and Ku Klux Klan terrorism re-burgeoned. Labor codes were passed making it illegal for anyone to lure blacks away from their job for any reason, including better working conditions and wages. Some codes provided criminal penalties for African Americans who quit their job, even when no debt was owed to their employer.

In short, while the ratification of the Fourteenth Amendment was critically important it was not-- by a long shot-- the end of the story of disparate treatment in America. And, of course, while severe racial inequality informed much of the early activity under the Fourteenth Amendment, its promise is in no way limited to inter-racial equality, but extends to economic class, gender, sexual orientation, religious beliefs, and a number of other categories.

C. The Nineteenth Amendment to the U.S. Constitution

The Nineteenth Amendment was passed by Congress on June 4, 1919, and ratified on August 18, 1920. It guarantees all American women the right to vote. The Amendment, brief in words, provides as follows:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.
>
> Congress shall have power to enforce this article by appropriate legislation.
>
> U.S. Constitution, Article XIX

Achieving this milestone required a lengthy and difficult struggle; victory took decades of agitation and protest. Beginning in the mid-19th century, several generations of woman suffrage supporters lectured, wrote, marched, lobbied, and practiced civil disobedience to achieve what many Americans considered a radical change of the Constitution. Few early supporters lived to see final victory in 1920**.**

III. STATE/FEDERAL ACTION & APPLICABLE LEGAL TESTS

It is important to appreciate what the Fourteenth Amendment “covers” when it speaks of “state” action, and the tests applied to a state action in order to evaluate whether it violates the Fourteenth Amendment.

A. State Action

The term “state action” as used in connection with the Fourteenth Amendment refers to a discriminatory act committed by a government body or governmental agent.

Such action may be taken by a legislative, executive, judicial, or administrative body, or some other person or entity acting under "color of law." By its terms, the protections of the Fourteenth Amendment do not extend to wholly private or nongovernmental conduct.

Does this mean private business owners (like the owner of a store or a restaurant) can freely discriminate against an individual with a different skin color or ethnic background, or different religious beliefs, or because that individual’s marriage does not involve a male-female union? That’s a challenging question that continues to play out in the legislatures and Courts around the country.

The short answer is: the Fourteenth Amendment has been interpreted to mean that if action is taken by a private individual or business that is, in some way, cloaked with a measure of state authority, the courts will find that this otherwise “private action” still constitutes a “state action” subject to the protections of the Fourteenth Amendment.

So-called “private” discrimination will amount to “state action” under the Fourteenth Amendment if one of four tests is satisfied:

(1) public function test—state action is found where the government has delegated its traditional responsibilities, such as police protection, to a private party or agency;

(2) nexus test—state action is found where there is a sufficiently close connection between the government and a private actor, such as where the state owns or leases property on which private discrimination occurs;

(3) state compulsion test—state action is found where the government coerces or significantly encourages private conduct, such as where federal regulations require private companies to comply with testing requirements;

(4) joint action test—state action is found where the government is a willful participant in discrimination by a private actor.

B. Federal Action

Of additional and important note, although the Fourteenth Amendment’s Equal Protection Clause does not offer protection against discriminatory laws promulgated by the president, Congress, or federal administrative agencies, the Supreme Court has interpreted the due process clause of the Fifth Amendment to provide such protection (*Bolling v. Sharpe* (1954) 347 U.S. 497).

In relevant part, the Fifth Amendment provides: “No person shall be . . . deprived of life, liberty, or property, without due process of law.” In the *Bolling* decision, the U.S. Supreme Court held

that while the 5th Amendment lacked an “equal protection clause,” in the words of Chief Justice Warren, "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." While equal protection is a more explicit safeguard against discrimination, the Court stated that "discrimination may be so unjustifiable as to be violative of due process." The Court concluded that it would be "unthinkable that the same Constitution would impose a lesser duty on the Federal Government."

Accordingly, it is now well-established that “equality under the law” as set forth in the Fourteenth Amendment, applies with equal force to both state action, and actions of the federal government, pursuant to the Fifth Amendment.

The next, and obvious, question is – once the Court determines that there has been some form of governmental action or involvement—what test is applied to determine whether that action violates notions of equal protection under the law?

B. Applicable Legal Tests

	Rational Basis Review	**Intermediate Scrutiny**	**Strict Scrutiny**
State Interest	Only needs to be *legitimate*. Can be merely conceivable – need not be actual	Must be genuine (not *post hoc*) and *important*	State interest must be *compelling*
Law's Relation to that Interest	Must be *rationally related* or non-arbitrary	Must be *substantially related*	Must be *necessary to achieve the purpose* – must be “narrowly tailored”

The Rational Basis Test

The first tier of scrutiny involves the least amount of judicial scrutiny. It is known as the “rational basis” or “rational relationship” test. The Supreme Court will approve legislation under this standard so long as the classification is reasonably related to a *legitimate* government interest.

The rational relationship test permits the legislature to employ any classification that is conceivably or arguably related to a government interest that does not infringe upon a specific constitutional right.

An overwhelming majority of social and economic laws are reviewed and upheld by courts using this minimal level of scrutiny.

The Heightened Scrutiny Test

The second tier of scrutiny used by the Court to review legislative classifications is known as heightened, or intermediate, scrutiny.

Legislation will not survive "heightened scrutiny" unless the government can demonstrate that the classification is *substantially related* to an important societal interest.

Gender classifications are examined under this middle level of review, as are classifications that burden children born out of wedlock.

The Strict Scrutiny Test

Under the first tier of scrutiny, known as strict scrutiny, the Court will strike down any legislative classification that is not necessary to fulfill a compelling or overriding government objective. Strict scrutiny is applied to legislation involving suspect classifications and fundamental rights.

A suspect classification is directed at "discrete and insular minorities" such as race or national origin. The Supreme Court will strictly scrutinize any distinction under a law or governmental action when it involves a suspect classification. If the law or its administration discriminates, or even overtly distinguishes, between the general populous and a "suspect classification" that classification will be strictly scrutinized. In order for a classification to be found permissible under this test it must be proven, by the state, that there is a compelling interest to the law and that the classification is necessary to further that interest. Rarely can such a nexus be proven.

A fundamental right is a right that is expressly or implicitly enumerated in the U.S. Constitution, such as freedom of speech or assembly, the right to privacy, or the right to travel. If a law or action by the government touches on one of these fundamental Constitutional rights, the state interest in advancing its position must be very compelling, or it will otherwise be invalidated. Again, it is a rare situation in which a proponent of disparate treatment can establish the nexus necessary to withstand strict scrutiny.

Applying strict scrutiny, the Supreme Court has consistently struck down legislative classifications based on the following:

<u>Suspect Classifications</u>:

- ✓ Race
- ✓ National Origin
- ✓ Religion (either under EP or Establishment Clause analysis)
- ✓ Alienage (unless the classification falls within a recognized "political community" exception, in which case only rational basis scrutiny will be applied).

Classifications Burdening Fundamental Rights:

- ✓ Denial or Dilution of the Vote
- ✓ Interstate Migration
- ✓ Access to the Courts
- ✓ Other Rights Recognized as Fundamental

IV. EVOLUTION OF EQUAL PROTECTION LAW

Until we get equality in education, we won't have an equal society.
U. S. Supreme Court Justice, Sonia Sotomayor

A. The Road to *Brown v. Board of Education*

Advancements made during Reconstruction were eroded when the Supreme Court invalidated the Civil Rights Act of 1875 (Civil Rights cases, 109 U.S. 3 [1883]). This act proclaimed "the equality of all men before the law" and promised to "mete out equal and exact justice" to persons of every "race, color, or persuasion" in public or private accommodations alike.

The Supreme Court was not persuaded that this act was the type of "appropriate legislation" contemplated by the Fourteenth Amendment. In striking down the law, the Court declared that when a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be a special favorite of the law.[1]

The Supreme Court's laissez-faire attitude toward racial inequality, during this era, was also reflected in the area of segregation. As Reconstruction collapsed, southern states gradually passed statutes formally segregating the races in every facet of society. Public schools, restaurants, restrooms, railroads, real property, prisons, and voting facilities were all segregated by race. The Supreme Court placed its imprimatur on these forms of racial apartheid in the landmark decision *Plessy v. Ferguson* (1896)163 U.S. 537.

Homer Plessy, who was seven-eighths Caucasian and one-eighth African, was prohibited from traveling on a railway coach for whites, under a Louisiana statute requiring "equal but separate accommodations" for black and white passengers. The Supreme Court, in an 8 to 1 decision, said this statute did not violate the Equal Protection Clause of the Fourteenth Amendment: "The object of the Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but …it could not have been intended to abolish distinctions based upon color, or to enforce …a commingling of the two races upon terms unsatisfactory to either." The

[1]In a changed, and ever-changing climate, Congress passed a new Civil Rights Act in 1964, as discussed below.

Fourteenth Amendment, the Court concluded, was "powerless to eradicate racial instincts or to abolish distinctions based on physical differences."

Following *Plessy*, the "separate-but-equal" doctrine remained the lodestar of Fourteenth Amendment jurisprudence for over half a century. Legally prescribed segregation was upheld by the Court in a litany of public places, including public schools. However, in the midst of World War II, many began to view the juxtaposition of the Allied powers fighting global totalitarianism and the citizenry practicing racial discrimination in the United States as hypocritical, especially when segregated African American troops were sacrificing their lives on the battlefield.

A series of Supreme Court decisions began to limit the scope of the separate-but-equal doctrine. The first hint of the Court's changing perspective came in the footnote to an otherwise forgettable case, *United States v. Carolene Products* (1938) 304 U.S. 144. In *Carolene Products*, the Court upheld a federal statute regulating commerce, applying a presumption of constitutionality to legislation in this area [see discussion re: rational basis test, above]. However, in a footnote, the Court cautioned that this presumption may not apply to legislation "directed at national … or racial minorities … [where] prejudice against discrete and insular minorities may be a special condition, which tends to seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial scrutiny."

The Court employed a "more searching judicial scrutiny" in *Missouri ex rel. Gaines v. Canada*, (1938) 305 U.S. 337. This case involved a black applicant who was denied admission to the University of Missouri Law School solely because of his color. The state of Missouri, which had no law school for blacks, attempted to fulfill its separate-but-equal obligations by offering to pay for the black applicant's tuition at a comparable out-of-state law school. The Supreme Court held that this arrangement violated the applicant's Fourteenth Amendment rights. The Court ruled that Missouri was required to provide African American law students with equal educational opportunities within its own borders, and could not shirk this responsibility by relying on educational opportunities offered in neighboring states.

When states did offer black students a separate legal education, the Supreme Court closely examined the quality of the educational opportunities afforded to each race in the segregated schools. In *Sweatt v. Painter* (1950) 339 U.S. 629, the Court ruled that the segregated facilities offered to black and white law students in Texas were not substantially equal. The Court determined that the faculty, library, and courses offered at the African American law school were patently inferior and denied the black students equal protection of the laws.

On the same day *Sweatt* was decided, the Court invalidated Oklahoma's attempt to segregate graduate students of different races within a single educational facility (*McLaurin v. Oklahoma State Regents* (1950) 339 U.S. 637). Black law students at the University of Oklahoma were required to attend class in an anteroom designated for "coloreds only," study on the mezzanine of the library, and eat in the cafeteria at a different time than white students. The Court struck down these arrangements, determining that segregation impaired the students' "ability to study, engage in discussions, exchange views … and in general, learn [the] profession." According to the Court, the Fourteenth Amendment required the integration of black and white graduate students.

This leads us to one of the U.S. Supreme Court's most well-known decisions of all time. In 1954, the Court decided the matter of *Brown v. Board of Education*, 347 U.S. 483. The *Brown* decision reviewed four consolidated cases in which local governments segregated public schools by race. In each case, black students were denied admission on an integrated basis. The question before the Court was not whether the segregated educational facilities were of a similar quality. Instead, the question was whether, under any circumstances, segregated educational opportunities could ever be equal, or substantially equal, in nature. In a resounding, unanimous opinion, the Court said that separate-but-equal education is "inherently unequal" and "has no place" in the field of public education.

Citing *Sweatt* and *McLaurin*, the Court reiterated that students' ability to learn is stunted without exposure to the viewpoints of different races. The Court also underscored the sociological and psychological harm segregation inflicts on minority children.

When the *Brown* decision was announced, observers realized that the rationale applied by the Court had far-reaching consequences. If segregation in public schools denoted the inferiority of African Americans, so did segregation elsewhere in society. If integration enhanced educational opportunities for U.S. citizens of every race, then perhaps integration could spur economic growth and social development. Observers also realized that if segregation in public schools violated the Equal Protection Clause, then all forms of government-imposed segregation were vulnerable to constitutional attack.

B. Post-*Brown* Legislative Challenges

Over the next forty years, the Supreme Court demonstrated that the principles enunciated in *Brown* were not limited to racial segregation and discrimination. In addition to striking down most legislative classifications based on race, the Court closely examined classifications based on length of state residency, and U.S. citizenship. The Court looked carefully at legislation denying benefits based on gender, or to children born out of wedlock. In fact, government classifications denying any group a fundamental right were reviewed with judicial skepticism.

The Supreme Court has recognized that nearly all legislation classifies on the basis of some criteria, bestowing benefits or imposing burdens on one group and denying them to another. For example, the government offers veterans, indigent people, and elderly people free or low-cost medical services that are not available to the rest of society. Progressive tax rates impose higher rates of taxation on the wealthy. Few such classifications are perfectly drawn by the legislature.

Most classifications are either overinclusive or underinclusive. An overinclusive classification contains all persons who are similarly situated and also persons who should not be included. An underinclusive classification excludes some similarly situated persons from the intended legislative benefit or detriment. Some classifications can be both underinclusive and overinclusive.

Further, while most plaintiffs who bring equal protection claims contend they are members of a historically vulnerable group to which the Supreme Court has given special protection, this is not always the case. In *Village of Willowbrook v. Olech* (2000) 528 U.S. 562, the Supreme Court

ruled that anyone who claims to have been singled out for adverse, irrational government action may bring a lawsuit based on the violation of the Equal Protection Clause. In effect, a person can become a "class of one."

Note also, that while the equal protection guarantee extends not only to laws that obviously discriminate on their face, but also to government action having a discriminatory purpose, effect, or application.

Governmental activity with a discriminatory purpose, also known as purposeful discrimination, may occur when a prosecutor exercises a peremptory challenge (the right to exclude a juror without assigning a reason or legal cause) to exclude a member of a minority race from a jury (*Batson v. Kentucky (1986)* 476 U.S. 79). If the prosecutor is unable to articulate a reason for striking the juror that is unrelated to race, the peremptory challenge will be nullified by the court.

A law can be neutral on its face or in purpose, but still be applied in a discriminatory manner. In *Yick Wo v. Hopkins* (1886) 118 U.S. 356, the Supreme Court struck down a San Francisco ordinance banning the operation of hand laundries in wooden buildings, because local officials were closing down only laundries owned by persons of Asian descent. White owners of such institutions were permitted to keep their businesses open.

Proof of discriminatory purpose, effect, or application can be difficult. Courts will search the legislative history of a particular classification for discriminatory origins. Courts also consider specific discriminatory actions taken by state officials in the past. Statistical evidence is relevant as well, but insufficient to establish discrimination by itself. *McCleskey v. Kemp* (1987) 481 U.S. 279

McCleskey involved a black man who was convicted and sentenced to death for killing a white police officer. On appeal, attorneys for the defendant relied on a sophisticated statistical analysis indicating that blacks were significantly more likely to receive the death penalty for killing a white person than were whites convicted of killing a black person. In a 5 to 4 decision, the Supreme Court said this evidence was not enough to demonstrate that the defendant had been denied equal protection. The majority held that the defendant could have prevailed under the Fourteenth Amendment only if he had shown a discriminatory purpose on the part of the Georgia legislature when it enacted the death penalty legislation, or on the part of the jurors in his trial when they imposed the death sentence.

V. CIVIL RIGHTS LEGISLATION

The Fourteenth Amendment authorizes Congress to enact "appropriate legislation" to enforce the Equal Protection Clause. The Commerce Clause provides Congress with the authority to enact legislation that affects interstate commerce, an even broader power. Pursuant to these clauses, Congress has enacted major pieces of legislation that have extended protection against discrimination beyond that contained in the Constitution. (Note: Many states have civil rights laws of their own which mirror those at the federal level. In addition, municipalities like cities and counties can enact ordinances and laws related to civil rights. State and local laws can be more protective, but not less protective that federal laws).

The following is a summary of some examples of milestone *federal* civil rights legislation of the last century; it is in *no way* intended to be comprehensive.

The Civil Rights Act of 1964, subsequently extended and amended. It prohibits discrimination based on race, color, sex, religion, or national origin (1) in employment by businesses with more than 15 employees; (2) by state and local governments and public educational institutions; and (3) in any program or activity receiving any federal funds. (42 U.S.C.A. § 2000e-2 et seq.).

Federal courts have interpreted Title VII to prohibit hostile work environments involving sexual harassment, even when the perpetrator and victim are the same gender.

Voting Rights Act of 1965, subsequently extended and amended. It suspended the use of literacy tests and voter disqualification devices for five years. It authorized the use of federal examiners to supervise voter registration in states that used tests or in which less than half the voting-eligible residents registered or voted. It directed the U.S. Attorney General to institute proceedings against use of poll taxes. Provided criminal penalties for individuals who violated the act.

The Age Discrimination in Employment Act of 1967, amended in 1978, prohibits arbitrary age discrimination of persons aged 40 and older by employers of 20 or more persons. (29 U.S.C.A. § 623 et seq.).

Under this statute, employers may defend their actions by demonstrating nondiscriminatory reasons for a particular decision, such as the dishonesty or incompetency of a discharged employee.

The Americans with Disabilities Act of 1990 prohibits discrimination against individuals with disabilities in employment, public services, public accommodations, telecommunications, and other activities. (ADA) (42 U.S.C.A. § 1211 et seq.).

The word “disability” includes terminal illnesses and prevents health care facilities from refusing to treat patients diagnosed with AIDS or HIV.

Title I of the ADA applies to employers and requires them to make "reasonable accommodations" for disabled employees who are otherwise qualified to perform a job, unless such accommodations would cause undue hardship to the business. Such accommodations can include making existing facilities more accessible, permitting part-time or modified work schedules, and reassigning jobs.

Title II applies to public entities, including any department, agency, or other instrumentality of a state or local government.

The ADA does not apply to the federal government, but other legislation does protect disabled federal employees.

Title III of the ADA governs public accommodations such as restaurants, theaters, museums, stores, daycare centers, and hospitals.

Affirmative Action, sometimes called benign discrimination because it is considered less harmful than other forms of discrimination, is the term used to describe government programs created to remedy past discrimination against blacks, women, and members of other protected groups. These programs include special considerations given to minorities competing against the rest of society for jobs, promotions, and admission to colleges and universities. Opponents of affirmative action characterize it as reverse discrimination because it often excludes individuals with ostensibly superior credentials, solely on account of their race or gender.

The Supreme Court has vacillated on what level of scrutiny applies to affirmative action programs. In *Regents of University of California v. Bakke* (1978) 438 U.S. 265, in which there was no majority opinion, four justices applied heightened scrutiny in holding that a university may consider racial criteria as part of a competitive admission process, so long as it does not use fixed quotas. But in *Richmond v. J. A. Croson Co*. (1989) 488 U.S. 469 109, five justices applied strict scrutiny to invalidate an affirmative action program intended to increase the number of minority-owned businesses awarded city construction contracts.

To date, the Supreme Court has favored application of strict scrutiny to cases involving benign discrimination (not obvious or intentional). When the more stringent level of scrutiny has been applied in these cases, the Court has held that a general legislative desire to correct past injustices was not sufficiently compelling to warrant a racial preference for minorities. Instead, the Court has ruled, benign preferences will be tolerated under the Fourteenth Amendment only when the government can demonstrate that they are narrowly tailored to correct specific discriminatory practices by the government itself or by some private sector entity within its jurisdiction.

VI. KEY ISSUES IN EQUALITY TODAY: KEEPING THE PROMISE

Nearly 250 years after the Declaration of Independence, the struggle for **equality for all** rages on. Over the past couple years, several highly-publicized issues have brought heightened focus to this debate.

As you feel comfortable, and as is appropriate for the class to which you are presenting, we would encourage you to dig into current events. The following is some background information concerning several of the “hot topic” areas, to facilitate your classroom discussions. Of course, they do not need to be the topics below; you can pick your own issue(s). We also leave to you to decide how best to inform that conversation, and make it productive.

Gay Rights

Gay rights are one of the most prominent areas of recent struggle for equal treatment under the law. The following is some selected background material:

In *Romer v. Evans* (1996) 517 U.S. 620, the U.S. Supreme Court reviewed a Colorado state constitutional amendment that prohibited any branch of the state or local governments from taking action designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation." The immediate effect of the amendment, known popularly as "Amendment 2," was to repeal all existing statutes, regulations, ordinances, and governmental policies that barred discrimination based on sexual preference. Under Amendment 2, state officials and private entities would have been permitted to discriminate against gays and lesbians in a number of areas, including insurance, employment, housing, and welfare services.

The state of Colorado defended Amendment 2 by arguing that it did nothing more than place homosexuals on a level playing field with all other state residents. The amendment, Colorado submitted, simply denied gays and lesbians any "special rights." The Supreme Court disagreed, holding that Amendment 2 violated the Equal Protection Clause because it "identifies persons by a single trait and then denies them protection across the board," which is something "unprecedented in our Jurisprudence."

Writing for a six-person majority, Justice Anthony Kennedy explained that "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." He went on to write, "[r]espect for this principle" demonstrates "why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare." Amendment 2 is unconstitutional, Kennedy concluded, because any law that generally makes it "more difficult for one group of citizens than all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."

Ironically, one of the laws viewed as discriminatory against gays– the U.S. military’s “don’t ask, don’t tell” policy – was intended as a progressive act. Signed into law by President Bill Clinton, it allowed gays to serve in the military. But they could do so only if they did not divulge their sexual orientation, and their commanding officers were prevented from asking about it. As it played out, the law was criticized for forcing gay military personnel to conceal their sexual identities, effectively living a lie to serve their country.

In 2010, a federal judge ruled that “don’t ask, don’t tell” violated both the First Amendment right of free speech and the right to equal protection under the law. The policy was repealed, but the battle for equality continued on other fronts.

The right of same-sex couples to marry was at the core of the equality debate. The Obama administration refused to enforce the Defense of Marriage Act – the 1996 law defining marriage as a legal union between a man and a woman – leaving the issue entirely in the hands of the states. Then, in June of 2015, in an historic 5-4 ruling, the U.S. Supreme Court of the United States found bans on marriage equality to be unconstitutional—and that the fundamental right to marriage is a fundamental right for all.

Gays, lesbians, bisexuals, and transgender individuals continue to face a great deal of discrimination and disparate treatment, particularly in certain parts of the country.

Women's Struggle for Equality

When women were granted the right to vote by the 19th Amendment in 1920, they weren't suddenly elevated to a level playing field with men. Inequality and discrimination continued, particularly in the workplace. After *Brown*, the women's movement turned to the 14th Amendment in its fight for equal rights.

The Supreme Court case *Ledbetter v. Goodyear Tire* and *Rubber Co*. in 2006 brought into focus the wage gap between men and women. Although the Supreme Court ruled against Lilly Ledbetter (based on its interpretation of the statute of limitations to file a lawsuit), Congress later passed the Lilly Ledbetter Fair Pay Act of 2009, giving women more leeway to fight discriminatory pay. That fight goes on, with women still making only 79 cents to

Immigration Status

After the terrorist attacks of Sept. 11, 2001, the country became more suspicious of and resistant to immigrants. The issue of illegal immigration continues to be a hot topic in the media, as well as in political debate. Some states have passed harsh laws targeting illegal immigrants. Yet, the Supreme Court ruled over a century ago in *Yick Wo v. Hopkins* that noncitizens are also covered by the equal protection clause of the 14th Amendment.

In *Hirabayashi v. United States* (1943) 320 U.S. 81 and *Korematsu v. United States* (1944) 323 U.S. 214 (1944), the Supreme Court established the precedent in dealing with acts and legislation that falls under the broad rubric of immigration status. The Supreme Court recognizes race, national origin, religion and alienage as suspect classes; it therefore analyzes any government action that discriminates against these classes under strict scrutiny.

Alienage, or the state of being an alien, i.e. a non-citizen of the United States, is a unique category. For purposes of state law, legal aliens are a suspect class (*Graham v. Richardson* (1971) 403 U.S. 365). As such, state actions are analyzed according to strict scrutiny. In contrast, because the United States Congress has the power to regulate immigration, federal government action that discriminates based on alienage will receive rational basis scrutiny. State acts that affect undocumented immigrants are generally analyzed with rational basis review unless the topic is education of children, in which case they are analyzed under intermediate scrutiny based on *Plyler v. Doe* (1982) 457 U.S. 202.

In *Plyler*, the Court applied the heightened scrutiny standard to invalidate a state law preventing undocumented children from enrolling in the Texas public school system.

Racial Inequity

Following the acquittal of George Zimmerman in the shooting death of Treyvon Martin, in 2013, a movement called Black Lives Matter was launched on social media. Black Lives Matter became nationally recognized for its street demonstrations following the 2014 deaths of two African Americans at the hands of law enforcement officials: Michael Brown, resulting in protests and unrest in Ferguson, and Eric Garner in New York City.

Since the Ferguson protests, participants in the movement have demonstrated against the deaths of numerous other African Americans by police actions or while in police custody, including those of Tamir Rice, Eric Harris, Walter Scott, Jonathan Ferrell, Sandra Bland, Samuel DuBose and Freddie Gray. In the Summer of 2015, Black Lives Matter began to publicly challenge politicians—including politicians in the 2016 United States presidential election—to state their positions on BLM issues.

At the core of the movement is the ongoing struggle for equal treatment under the law. In particular, BLM calls for the reform of the criminal justice system which arrests and incarcerates blacks in disproportionate numbers, and in which excessive use of force against young black men has been a tragic and repeated storyline in recent years.

See Optional Presentation Materials, below

Can a Legal Decision Bring About Rapid Social Change?

Overview

This strategy focuses on the resistance to the *Brown* decision, the Court's later decision that desegregation proceed "with all deliberate speed," and the situation in schools now.

Preparation

The *Brown* decision didn't specify how quickly desegregation was to be achieved in the thousands of segregated school systems. The case was reargued on this question, and in 1955 the Court issued an opinion, commonly referred to as *Brown II.*

"The NAACP urged desegregation to proceed immediately, or at least within firm deadlines. The states claimed both were impracticable. The Court, fearful of hostility or even violence if the NAACP views were adopted, embraced a view close to that of the states…. [e]ssentially return[ing] the problem to the courts where the cases began for appropriate desegregative relief—with … "all deliberate speed.". . . By 1964, a decade after the first decision, less than 2 percent of formerly segregated school districts had experienced any desegregation."'

—Dennis J. Hutchinson, *Brown v. Board of Education*, in the *Oxford Companion to the Supreme Court of the United States*

Presentation

1. Reaction to the first *Brown* decision was fierce in the Southern states, with newspaper editorials predicting violence and political leaders promising defiance. How do you think the Court's ruling for desegregation with "all deliberate speed" should have been interpreted? Do you think it gave too much deference to white resistance in the South? What do you think the result would have been had the Court demanded immediate desegregation? What would you have done as a justice in the same situation?

2. What can the Supreme Court do to enforce its decisions? What is the role of the other branches in enforcing Court decisions? What can the Court do without the full support of the other branches?

3. Why were schools the focus of the litigation that led to *Brown v. Board*? Is it more important for schools to be diverse and desegregated than the rest of society?

4. Schools that once were segregated by law have tended to "resegregate" as a result of housing patterns and other circumstances. Is the "voluntary" resegregation in our nation's schools harmful? In terms of effect on students, is there a difference between legally mandated segregation and segregation due to other factors? Should national, state, or local governments try to do something about this issue? If so, what can be done?

Does a Curfew Discriminate Against Young People?

Procedures

5. Distribute the handout and ask students to read the words from the Fourteenth Amendment at the top of the page. Explain principles of equal protection, and the standards that courts use in deciding such cases.

6. Break the class into groups. Explain why appeals courts usually have an odd number of judges (to reduce the chances of tie votes). Discuss how each group is now, and for the remainder of the period, a court asked to decide the case outlined in the handout.

7. Explain that a lower court has declared the statute in question unconstitutional, and the City Council has appealed. The lower court found that evidence failed to show a sufficient need for the law to override minors' equal protection and due process rights and parents' right to due process. (Explain these points briefly, and point out that they will be raised again in the appeal, so the student "court" will have a chance to examine them in detail.)

8. As judges, they would have read the briefs submitted by the parties and heard oral arguments (briefly describe this stage in the appellate process). Now they will meet and discuss the case, deciding if the ordinance is constitutional or violates constitutional guarantees of equal protection and due process. Explain that the court will consider the rulings of other courts considering cases raising such issues (explain precedent). In particular, the court will have to decide which standards to apply. Make sure they understand the standards.

9. Give them time to read the arguments, discuss the points, discuss which standards to apply, and reach a decision. You may want to go from group to group to answer questions and offer assistance but, allow them to reach their own decisions.

10. Ask each group to give its decision and explain its reasoning. If different "courts" reach different decisions, explore their reasons.

11. You can share with them the result of the actual case (see Case Abstracts below), and point out that judges on the same court don't always agree and that different courts at the same level can disagree, until a higher court gives guidance on the point.

Case Abstracts

This case is a fascinating teaching tool because the actual decision by the three-member appeals court panel hinged precisely on which standard to apply -- with the three justices splitting three ways. One judge said the act failed intermediate scrutiny because it wasn't "substantially related" to the governmental interest.

One said it failed strict scrutiny because it was not "narrowly tailored" to be the least restrictive means of accomplishing that interest. Even though the judges disagreed on their reasons (a chance for you to discuss concurring opinions), they agreed that the law failed to pass constitutional muster, so the law was struck down.

The remaining judge applied the rational relationship test, and upheld the constitutionality of the law on the grounds that it was rationally related to the government's interest. This judge filed a dissenting opinion.

You can discuss with the students how picking which test to use really decides cases such as this. If you are applying strict or intermediate scrutiny, nine times out of ten you will probably declare the law or practice unconstitutional. If you apply the "rational basis" test, there's a far better chance the law or practice will be upheld.

For more on the issues raised by curfews, see *Quth v. Strauss*, 11 F 3d 448 (Fifth Circuit, 1993), in which the Dallas curfew was upheld; *Hutchins v. District of Columbia*, 942 F. Supp 665 (D DC, 1996), in which the district court struck down the DC curfew; and *Hutchins v. District of Columbia*, in which the divided three-judge panel agreed that the District curfew was unconstitutional.

See classroom <u>Handout</u>, below.

LAW WEEK HANDOUT

Equal Protection of the Law Lesson – 14th Amendment

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

14th Amendment to the U.S. Constitution

You Be the Judge!
For one day, you and your classmates will decide a legal case that actually came before a U.S. Court of Appeals. *Hutchins v. The District of Columbia* raised the issue of whether the city government has denied young people equal protection of the law and due process (and their parents due process) in passing a curfew ordinance.

Background Facts
Your city's council has just passed a juvenile curfew law that was intended to reduce violence by and against youth in the city. Modeled on a Dallas, Texas, ordinance that the United States Court of Appeals for the Fifth Circuit held was constitutional, the law bars youth under 17 from being in public places from 11 p.m. to 6 a.m. on school nights and midnight to 6 on Friday and Saturday. Exceptions include youth who are accompanied by adults and emergency trips sanctioned by parents.

The law permits police officers to stop any young person and demand to know his or her age and reasons for being out during curfew hours. If the officer "reasonably believes" that a young person is violating the curfew, the individuals may be arrested and detained. A young person's parents may also be punished for their child's curfew violations.

Your Role as a Court
As a court, you have heard arguments in favor of the curfew made by the lawyer representing the City Council for your city. Their lawyer has pointed out many circumstances that justify the government in passing an ordinance that imposes certain restrictions on youth.

- the ordinance is a rational (reasonable) attempt by the city to confront a major problem
- the rate of crimes by and against youth is the highest in the country
- children are vulnerable and need special protection; they are unable to make decisions in an informed manner

- the curfew will protect children from the drug trade and other dangers more prevalent during night time hours
- it will protect the community from noise, vandalism and other misdeeds
- it will give parents greater control and responsibility for the movement of their children

And you've heard arguments from the lawyer representing youth in your city who are seeking to overturn the law. Their lawyer maintains that the ordinance adversely affects a number of constitutional rights of young people.

broadly stifles liberty of children [14th Amendment] and denies them equal protection [14th Amendment]

- interferes with their right to association [1st Amendment]
- limits their participation in political, economic and religious activities [1st, 14th Amendments]
- limits their right to move about freely [14th Amendment]
- selective enforcement -- more likely to stop minority or poor children than those from affluent homes [14th Amendment]
- youth can be arrested without probable cause [4th Amendment]
- denies parents due process by making them criminally liable for their children's curfew violations
- "It's unfair to punish good kids who are out trying to make something of themselves when only a small percentage are committing crimes in the city during curfew hours."

The Decision
Judges of the court, how find you? In your opinion, address:

- Was the alleged discrimination by government?
- What rights are implicated?
- What level of scrutiny should be applied?
- Did the government meet its burden under the standard you've selected?