



EQUAL PROTECTION UNDER LAW: THE BATTLE OF THE SEXES

OVERVIEW: This workshop looks at the 14th Amendment with a specific eye on the Equal Protection Clause and the various ways that the government has attempted to prevent discrimination over time. Title IX and the Maine Human Rights Act are both examined as specific examples, followed by an activity where students attempt to put those protections into practice by analyzing hypothetical scenarios involving controversial access to athletics by students of the opposite gender.

TIME: Roughly **one hour** is needed to conduct this lesson in full, though teachers wishing to explore the 14th Amendment in greater detail could devote more time to that portion of the lesson. The activity could also be extended if desired.

BACKGROUND KNOWLEDGE NEEDED: Students do not need any background knowledge before beginning this workshop. For teachers, the necessary background information to cover regarding the 14th Amendment is included early in the lesson. Teachers desiring more detailed information should consult the end of the lesson plan for a long list of free online resources provided by the ACLU.

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– LESSON OUTLINE –

This lesson, created by the ACLU of Maine, addresses the 14th Amendment, with a particular focus on the Equal Protection Clause. After a quick legal primer, students are tasked with resolving a series of hypothetical scenarios involving a student of one gender who wishes to gain access to an athletic activity on a team of the opposite gender, for reasons that are not so easily dismissed.

OBJECTIVES:

This lesson is designed to increase students' knowledge of the 14th Amendment and to challenge them to grapple with the difficult choices it often requires. By using school athletics as an example, students will directly address a plausible confrontation between the Title IX protection against gender discrimination and the individual right enshrined in the guarantee of "equal protection under law." Ideally students will come away learning:

- ❖ **The 14th Amendment is one of the most important additions to the U.S. Constitution**, and its historic passage just after the Civil War ultimately recast the path that the United States would take during and after Reconstruction.
- ❖ **Title IX has been one of the most successful government efforts at reducing gender discrimination.** It has provided more equal opportunities to female students with resounding success, but it hasn't come without controversy and tough choices.
- ❖ **Equal protection is a difficult thing to ensure!** On the one hand we want the government to treat everyone the same, yet we also recognize that individuals have the right to pursue happiness and a strict adherence to "equal protection" can challenge that right. As such, easy solutions are often hard to come by.

NOTE: Because of the complexity of 14th Amendment jurisprudence, this lesson focuses mostly on the concepts and principles involved. Some more advanced material is included for upper-level classes, but the lesson is specifically designed to function for all high-school aged students, regardless of prior knowledge of the 14th Amendment.

PRE-TEST: The included pre-test is designed to gauge students' baseline knowledge. Teachers are encouraged to modify or add-on to fit their own objectives, and to follow-up after the activity to see what knowledge students gained. (Answers: B,A,D,C,B,C)

14th Amendment – PRE-TEST

1.) The 14th Amendment was ratified just a few years after which war?

- a) Revolutionary War b) Civil War c) World War I d) World War II

2.) If there is a dispute over whether the government has or has not violated an amendment to the Constitution, who makes the final decision?

- a) The U.S. Supreme Court
- b) The governor of the state where the violation allegedly occurred
- c) The U.S. Senate
- d) A vote is called and the citizens decide

3.) When the Bill of Rights was originally ratified in 1791, it limited the government by establishing certain rights for the people, such as free speech, privacy, and the right to bear arms. However, at the time it did not apply to all levels of government. Who specifically was restricted by the Bill of Rights at the time of passage?

- a) Federal and state governments, but not local towns and cities
- b) State governments only
- c) Local police departments and schools, but not the federal or state government
- d) Federal government only

4.) What law was passed primarily to address gender discrimination at public schools?

- a) Gender Equality Act of 1967 b) 19th Amendment
- c) Title IX d) Fair Schools Act of 1981

5.) Which of the following “clauses” is NOT found in the 14th Amendment?

- a) Equal Protection Clause
- b) Freedom of Expression Clause
- c) Due Process Clause
- d) Citizenship Clause

6.) How did the 14th Amendment ultimately change the relationship between states and the federal government?

- a) Required state governments to seek permission before changing tax rates
- b) Gave more power to the federal court system to decide state and local matters
- c) “Incorporated” the Bill of Rights so that it applied to state governments as well
- d) Established the Electoral College as the vehicle for states to elect presidents

14th Amendment Background and History

Every class is different and the amount of background you wish to present may vary greatly depending on the grade level of students and the amount of time available. Ideally, the two points below should be covered with all students, with the following page serving as an option only for more advanced classes. However, if time is tight this entire section can be truncated or even eliminated.

- 1.) **HISTORICAL FORK IN THE ROAD:** The 14th Amendment is one of the “Reconstruction Amendments.” Passed in 1868, just three years after the end of the Civil War, it played a crucial role in setting the United States on a new path in the aftermath of war. Draw on students’ knowledge of the Civil War and Reconstruction to place the 14th Amendment in proper historical context. This isn’t a history lesson so don’t harp on the point, but make sure the connection to the time period is made.
- 2.) **THREE KEY CLAUSES:** The key parts of the 14th Amendment come in the first section, which includes three very important phrases, which lawyers and judges refer to as “clauses.” Briefly discuss each one with students:
 - a. **CITIZENSHIP** – This clause negated one of the Supreme Court’s most infamous (and highly criticized) rulings, the *Dred Scott* decision of 1857, which held that neither freed slaves nor their descendants could ever become citizens of the United States.
 - b. **DUE PROCESS** – This clause guarantees everyone a fair process when faced with denials of life, liberty and property. A few examples may help to illustrate the concept, and since public schools must also provide due process, that’s a great place to turn: notification of charges, a fair hearing for suspensions or expulsions, and requirements that the punishment fit the crime are all requirements of the Due Process Clause of the 14th Amendment.
 - c. **EQUAL PROTECTION** – This is the primary tool we use in court to ensure equality and it has had an impact on many different areas of American life. Of course, like many phrases in the Constitution, there are differing views on how “equal protection” should be applied and what exactly it means. Working through the complexities and challenges of this clause will be the primary focus of this lesson’s activity.

Citizenship Clause:

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.

Due Process Clause:

No State shall... deprive any person of life, liberty, or property, without due process of law;

Equal Protection Clause:

nor deny to any person within its jurisdiction the equal protection of the laws.

Background and History (cont.) – ADVANCED CONCEPTS

3.) **FEDERAL vs. STATE:** The 14th Amendment was used to “incorporate” the Bill of Rights to states. When the Bill of Rights was first ratified in 1791 it only applied to the *federal* government. Though it didn’t happen immediately, the Supreme Court eventually found that the 14th Amendment meant that states must also honor those core individual rights like free speech and privacy. If students are particularly well-versed in history, this can lead to an interesting discussion of federal vs. state government and how that debate has evolved over time. (Is incorporation a good thing because it guarantees more uniformity of rights across states, or is it a bad thing because it infringes on states’ rights?)

4.) **SUBSTANTIVE vs. PROCEDURAL DUE PROCESS:** Over time the Supreme Court has expanded on the notion of “due process,” often quite controversially. Although the Constitution makes no mention of “substantive” or “procedural” due process, these two variations of the 14th Amendment have been accepted by the Supreme Court and are now embedded into our legal system. (This is a great example for students of how the vagaries of the Constitution are resolved – and arguably manipulated – by the judicial branch.) Substantive due process in particular has had an enormous impact on American law, being used to protect women’s right to choose and other rights deemed “fundamental” by the Supreme Court.

- a. **Substantive Due Process:** This prohibits the government from infringing on our most fundamental liberties, even if the *process* by which they infringe could technically be considered “fair.” These include the rights found in the first eight amendments to the Constitution, the rights of “discrete and insular minorities,” and a few other essential rights such as voting.
- b. **Procedural Due Process:** This refers to the *manner* by which laws are enforced. It guarantees a fair *process* for people at trials, hearings, and other government proceedings.

Examples of Landmark 14th Amendment Cases:

- ❖ **Brown vs. Board of Education (1954):** Racially segregated schools are inherently unconstitutional.
- ❖ **Loving vs. Virginia (1967):** Laws banning interracial marriage are unconstitutional.
- ❖ **Roe vs. Wade (1973):** Women have a constitutional right to an abortion under certain circumstances, as protected by the fundamental right to privacy.
- ❖ **Bush vs. Gore (2000):** Resolved lower court disputes and settled the 2000 presidential election.
- ❖ **Gay rights cases:** A series of landmark rulings on gay rights have relied on the 14th Amendment in various ways, such as *Lawrence vs. Texas*, *Romer vs. Evans*, and most recently *Windsor vs. U.S.*

Primer for Title IX and Maine Human Rights Act

If you have time and want to give students a broader picture of the law on equal protection and gender discrimination, take a few minutes to review the following information. If students have studied the Civil Rights Movement they should be able to place these laws in historical context.

TITLE IX: Start by asking students what, if anything, they know about Title IX. Most of the time students will make the connection to sports, but may not know much more. Tell students that Title IX isn't just about sports. In fact, the landmark legislation, passed in 1972, applies to all educational programs that receive federal funding, and to all aspects of a school's educational system.

❖ **Title IX makes it illegal to discriminate based on gender** in the areas of curriculum, extra-curricular activities, student aid, student services, counseling and guidance, and financial aid.

❖ **There are two major exceptions for sports** that will become topical during our activity:

- 1.) Single-sex teams are permitted in contact sports.
- 2.) Single-sex teams may be permitted in non-contact sports if parallel male and female teams are established. So, for example, a men's field hockey team is permitted if a women's field hockey team exists.

❖ **Remind students that while Title IX has had a larger impact for girls, it has also opened doors for boys as well.** Classes like home economics must now be offered to boys, just like classes on mechanical drawing must be open to girls. Title IX protects girls AND boys from discrimination, not just on athletic fields but in classrooms and public schools everywhere.

➤ **DISCUSSION IDEA:** Ask students how much credit they think Title IX deserves for the progress in gender equality over the last 40 years, or whether other social or political factors have played a larger role. If they don't think much has changed, consider using any available personal anecdotes to demonstrate how different things were in the 1970's.

MAINE HUMAN RIGHTS ACT: One of the biggest legislative accomplishments of the Civil Rights Movement was the Civil Rights Act of 1964, which outlawed discrimination based on race, color, religion, sex, or national origin. Seven years later, in 1971, Maine passed a similar law, known as the Maine Human Rights Act, which protects against discrimination in employment, housing, access to public accommodations, and education.

ADVANCED TIE-IN TO FEDERALISM:

Ask students which level of government should be tasked with policing discrimination: federal, state, or local? (Or none at all?) How does the Constitution and the 14th Amendment impact this?

❖ **PROTECTED CLASSES:** Students may find it interesting that the Maine Human Rights Act lists "protected classes" that are explicitly protected by the law. The classes are: race, color, ancestry, national origin, religion, sex, physical or mental disability, age, familial status, and sexual orientation. (The last one was only added in 2005 by voters – *which is itself a good topic for discussion.*)

The Activity

OVERVIEW: Each of the attached scenarios involves a confrontation between the Title IX protection against gender discrimination and the individual right to “equal protection under the law” guaranteed in the 14th Amendment. In each case, a student of one gender wishes to gain access to the athletic activity of a team of the opposite gender. Students are charged with deciding how to resolve the inherent conflict, first by developing one or more guidelines to be used to address the conflict, and then by voting to support or oppose.

NOTE: The framework below should work for most normal class sizes, but if your class is small enough that groups don't make sense just have all students work together and craft a guideline for each scenario. The true point of the exercise is to get students thinking critically about tough constitutional issues. The attached scenarios are a great resource for doing this, but if you need use them differently to fit your class or your teaching style, feel free to do so.

INTRODUCE SCENARIOS AND TAKE PRELIMINARY VOTE (10 minutes):

1.) To get things started, read all four of the included scenarios aloud to the class.

If possible, give a printed copy to each student or project them onto a screen. (If you are pressed for time or have a smaller class you may consider using only 2 or 3 of the scenarios.)

2.) Before any discussion, conduct a quick preliminary vote on each of the scenarios to see whether students believe the athlete in question should be allowed to play.

The purpose here is twofold: As a presenter, the vote will give you a few clues about where the class is leaning and where you might need to prod them during discussion. For the students, voting will engage them with the material and force them to pick a side. Remind them that judges must do the same thing, even when there is real merit in each side's argument.

3.) If possible, spend a few minutes discussing the scenarios as a class.

Ideally try to get a few students from each side to explain why they think the athlete in question should or should not play. If any vote is unanimous, be prepared to present the alternative perspective (whether or not it's how you genuinely feel) for balance.

4.) Next, tell students that they will be separated into groups and tasked with developing an official guideline – much like an athletic association board - that can be used to resolve their assigned scenario, and any similar situation that might come up in the future.

The purpose of the activity is 1.) for students to identify which factors should officially be looked at to ensure that everyone is treated equally, and 2.) to identify exactly where the inherent conflicts are – fair competition, risk of injury, etc. – and to consider how best to address those conflicts *in a constitutionally appropriate matter*. Remind them that their solutions must work under the Equal Protection Clause and the 14th Amendment, as well as Title IX and the Maine Human Rights Act. Encourage them to consider what that means while crafting their guideline.

GROUP WORK (~15 minutes):

- 1.) **Separate students into small groups, ideally 4-6 in size.** If possible try to have an equal number of groups covering each scenario, but if the numbers don't allow it the activity will still work fine. *NOTE: Generally you will want to assign each group a different scenario to work on, but if you have more time available you could instead assign all groups the same scenario and then repeat the exercise for each subsequent scenario. The activity will work fine either way – it's just a matter of which method you think will be most effective for your class.*
- 2.) **Circle around the groups as they are working and offer guidance if necessary.**
The Socratic method often works best here, as one of the major objectives of the exercise is for students to recognize the challenges in creating these types of rules. There are no right or wrong answers, but sometimes by questioning students you can further their understanding of the issues at hand. Be the devil's advocate and challenge students to think through any unintended consequences of their proposed rule.
- 3.) **Upon completion have one student from each group write their rule on the board** (or if you have the capability, get them to type out their rules and project them onto a screen).

RECONVENE AND REVIEW EACH GROUP'S WORK (10-15 minutes):

- 1.) **Have each group elect a spokesperson to present the rule they crafted and to briefly explain the thought process behind it.** If time is short you can shorten this step and simply have each group read its rule with no additional comments. However, given that the process is a big part of the activity it will be more impactful if students explain what concerns they had and how they ultimately arrived where they did.
- 2.) **After each group has presented, open the floor up for comments and discussion.**
The goal here is to put the activity that has just occurred into context and reinforce some of the material that was covered earlier. Explore any interesting constitutional questions raised by one or more of the groups. Ask students to explain aspects of their proposed rules that you think will further their understanding of the issues at play. Every class will be different, but as long as you facilitate a respectful discussion with a focus on 14th Amendment concepts, you'll have succeeded.

VOTE! (5 minutes)

- ❖ **After discussing each new proposal, it's time to vote.** Go through each scenario and have students vote first on whether they accept or reject the new proposed rule. Then have them vote on the particular scenario and whether they believe the student in question should be allowed to play. If the class accepted a proposed rule, they should vote in accordance with that new guidance handed down.

Wrap-Up Ideas

Depending on the structure of your class and the amount of time available, your wrap-up could take several different forms. Regardless of how you do it, reinforcing the concepts that you've introduced to your students is essential. Here are a few ideas for how to do it.

USE THE VOTE TO SEGUE INTO A CLOSING: The main purpose of having students vote on their objectives is simply to engage them with the material and force them to weigh the concerns of each side. However, as you segue to wrapping up the lesson, the vote can be invaluable as a tool to bring all of the ideas together. Every class will be different so there are no set rules about how you wrap things up, but here are a few ideas if you don't have obvious alternatives:

- **LOOK FOR SWITCHED VOTES, AND EXPLORE THE CAUSE:** Ask students who changed their mind during the course of the activity to explain their shift. Did someone else make a compelling argument from the other side? Was it simply a matter of taking more time to digest the hypothetical situation? Look for major shifts within the class and address them openly if you can weave it into the larger narrative of the lesson.
- **GENDER DISCREPANCIES:** If obvious schisms exist between how the boys and girls voted, you may want to address this with the class. One way to tie it in to the real world is to talk about the U.S. Supreme Court, which is presently made up of six men and three women. Oftentimes cases involving women's rights or issues like abortion or contraception will show obvious splits among the justices along the lines of gender. Is this a reflection of politics or does it speak to something else?

USE THE LESSON TO BEGIN A DEEPER DISCUSSION: If you have time to lead a discussion with students, here are some good ideas for potential wrap-up questions:

- **COMPARING ERAS:** What about the political and social climate in 1868 would have been different from the 1950s, 60s and 70s when the Equal Protection Clause began to be applied so frequently to civil rights issues? How do both eras compare to our current time?
- **LOOKING AHEAD:** Oftentimes when we look back at history we find old laws and ideas seem totally outdated. (Segregated schools, no voting rights for women, etc.) In 50 years when we look back on the early 21st century, how might future generations judge our application of "equal protection" and which of our current laws might seem misguided?
- **WHAT ABOUT AGE?** From driving to drinking to voting to eligibility for various programs, the government imposes many restrictions on us simply based on our age. Is this an equal protection issue? What might be different about age as compared to gender or race? Do those differences excuse any and all restrictions, or should a unique formula be applied when the government is legislating around age?

USE THE ACTIVITY TO TIE-IN WITH OTHER SUBJECTS: This lesson has focused mostly on the Equal Protection Clause and the issue of gender in athletics. However, the 14th Amendment is applicable to all sorts of topics, both historical and current. If you've covered some of these areas in your class already, consider connecting the dots to reinforce what students have just explored during the activity:

- **IMMIGRATION:** The 14th Amendment's Citizenship Clause says that "all persons" born in the U.S. are citizens. What does this mean for our current debate over immigration reform? How might the Constitution be used by both sides to score political points or influence the discussion? Are the Equal Protection and Due Process Clauses also at play?
- **STUDENT RIGHTS:** The Constitution mentions no exception for students, yet courts have always held that the rights of young people at school are not the same as they are out in public. Still, the Equal Protection and Due Process Clauses are applicable to many situations that arise in school. While it might be too complicated to get into the legal details of when and how those clauses are applied to students, generating a discussion about how they *should* be applied can be a good way to keep students interested while at the same time reinforcing the principles that this lesson focuses on.
- **BULLYING:** In 2012, the Maine Legislature passed an anti-bullying bill that has many tie-ins to the 14th Amendment. For a more thorough look at the issue of bullying, [check out our full lesson plan on the subject](#).

But if you're just looking for a quick tie-in, consider asking students to think of their own connections. Why would equal protection and due process be so closely tied in with bullying, and how should legislators deal with the issue in a manner that honors both the spirit and the letter of the Constitution?

ACLU's FREE ONLINE RESOURCES

TITLE IX:

- [Title IX Resource Page](#)
- [Title IX Timeline](#)
- [Sex-Segregated Schools](#)
- [Pregnant and Parenting Teens](#)
- [Title IX and Sexual Violence](#)
- [How Far Has The Women's Movement Moved In The Last 40 Years?](#)

EQUAL PROTECTION:

- [Women's Rights](#)
- [Racial Justice](#)
- [LGBT Rights](#)
- [Voting Rights](#)

RELATED TOPICS:

- [ACLU of Maine Lesson on Anti-Bullying Law](#)
- [Immigrants' Rights](#)
- [Juvenile Justice](#)

SCENARIOS

Scenario 1: Rustam (“Rusty”) is a senior who emigrated to the United States from Pakistan with his family two years ago. He was distressed to find that field hockey, the national sport where he grew up, was offered only as a girls sport here. He is not particularly skilled, but he is big and strong, and has already injured one of his own teammates in a collision in practice. An article in the sports section of the local newspaper has made a big deal about his arrival. Now the association has been asked to decide if he should be allowed to compete on the girls team.

[basis of objection: injury risk]

Scenario 2: Melissa was already what used to be called a “tomboy” when she was only five and wrestling, first with her older brothers, and then with any takers from her neighborhood. She also excelled at the local martial arts studio from an early age. Now that she is a freshman in high school, she wants to wrestle competitively, but there is only a boys wrestling team. Regulations ensure that she will only wrestle against boys in her own weight class, but without explaining his reasons, an opposing coach is refusing to bring his team to the first meet if she is allowed to participate. The association has one day to decide whether she is eligible to wrestle for the upcoming match.

[basis of objection: unknown, likely due to sexual taboo]

Scenario 3: Paget is a freshman who played pee-wee football when she was younger and developed a love for the sport. However, now that she is in high school her decision to try out for the team as a wide receiver has raised some eyebrows. Still, her teammates have largely been supportive and have stood up for her repeatedly. In two previously scheduled games with Our Lady of the Fields, a fundamentalist school, Paget didn't play out of respect for their team's expressed belief that they should not be forced to "tackle a girl" or play a team that was not all-male. As things have turned out, however, Paget's team is now going to face Our Lady of the Fields one more time, in the state championship game, and Paget is insisting that she be allowed to play. Our Lady is threatening to withdraw and forfeit both the game and the championship if they are required to play against a girl. Both sides are appealing to the association to rule on the issue.

[basis of objection: religious belief]

Scenario 4: Derrick is a very tall (6' 5") and coordinated junior who has a talent for spiking and blocking volleyballs. His high school has no boys volleyball team, so until recently, citing Title IX, he has been playing on the girls team. This year, suddenly, his team is undefeated and heading into the playoffs, in no small measure due to Derrick's presence on the team. He has also just set a new state single-season scoring record for girls, and girls on opposing teams are clearly becoming intimidated and frustrated by his thunderous spikes. Both coaches and parents of several of these girls have approached the association seeking a ruling against his continued play on the girls team.

[basis of objection: significant adverse effect on fair competition]