

Lesson 8: Extending the Rights of Citizenship Part II: Equal Protection Clause of the Fourteenth Amendment and Affirmative Action

Abstract: The Fourteenth Amendment was added to the Constitution as part of the Reconstruction Amendments at the end of the Civil War. It granted former slaves the rights of citizenship and thereby nullified the Dred Scott decision. Although all five sections of the amendment are important historically, the Due Process and the Equal Protection Clauses in section 1 have significantly affected ideas of freedom and equality in the United States since its ratification. This second lesson on the Fourteenth Amendment focuses on the Equal Protection Clause. Students explore the influence of this clause on the rights of individuals over time by comparing *Plessy* and *Brown*, looking at the impact of the Equal Protection clause on various groups, and engaging in an activity and debate involving affirmative action in college admissions.

Content Expectations: C2.1.4; C2.2.2; C2.2.5; C3.1.5; C3.2.1; C3.4.3; C3.4.5; C5.3.1; C5.3.8; C6.1.5

Common Core State Standards for Literacy in History and Social Studies: RH.9-10.1, 2, 4, 6, 8, 9, and 10; WHST.9-10. 9 and 10

Key Concepts:

- constitutional supremacy
- adversarial system
- equal protection
- governmental (state) action
- independent judiciary
- individual rights
- judicial review
- precedent
- rule of law

Teacher Note: The Fourteenth Amendment is addressed in two separate lessons. This lesson serves as the second, addressing the Equal Protection Clause and the issue of affirmative action in college admissions.

Lesson Sequence:

1. Begin this lesson by asking students to engage in a quick write in their Citizenship Notebook about the following questions:
 - What is racial segregation?
 - During what time period in American history was racial segregation by law considered constitutional?
 - When it was considered constitutional, how did racial segregation affect the lives of African Americans?

Then have students turn and talk about these questions with a partner. After students have briefly discussed their answers with a partner, ask a few pairs to share their discussion, checking and probing for prior knowledge.

Teacher Note: Be sure students recognize that even after the passage of the Fourteenth Amendment, many state laws required racial segregation.

2. Display and distribute the chart “**Comparing Plessy and Brown**” located in the *Supplemental Materials (Unit 5, Lesson 8)* to the class. Explain to students that they will be reading summaries of each of these cases to complete the chart. Review the contents of the chart with the whole class before distributing the reading, “**From Plessy to Brown**,” also located in the *Supplemental Materials (Unit 5, Lesson 8)*. Allow time for students individually to read each summary and complete the chart before the final question (about 10-15 minutes).
3. Place students in groups of three to compare their findings on the “**Comparing Plessy and Brown**” chart. They should also share their thoughts about the final question on the chart. Then, as a class, debrief the chart, answering any questions students may have. Discuss with the class the final question on the handout:

What do you think changed in America between 1896 and 1954?

As the discussion develops, make sure to highlight the differences between the historical context of each case. Question students about how these differences might have contributed to a reversal of precedent and a new interpretation of the Fourteenth Amendment’s Equal Protection Clause. For example, how might the fact that the *Brown* case occurred at the beginning of the modern civil rights movement have influenced the court?

The following information may assist in your discussion of the Fourteenth Amendment:

- It requires the laws of a state to treat an individual in the same manner as others in similar conditions and circumstances.
 - It is not about being equal, but about equal treatment and equal application of the law.
 - It has been a tool by which the courts have protected civil rights.
 - It has been viewed as America’s attempt to honor Thomas Jefferson’s "all men are created equal" phrase from the Declaration of Independence.
 - It has at times been confusing, perhaps because the Framers of the Fourteenth Amendment left us no explanation of exactly what they meant.
 - The plain language of the amendment does not in fact refer to race, although at the time of its adoption, everyone understood that the amendment was meant to protect the former slaves from discrimination.
4. Conclude the discussion by having students write reflectively in their Citizenship Notebook in response to the following questions:
 - How did the meaning of the Fourteenth Amendment change between 1896 and 1954?
 - Given that race is not addressed in the text of the Fourteenth Amendment, what predictions do you have about how the Fourteenth Amendment has been used since 1954? Explain.
 5. Have students share their predictions from Step 4 above with a partner in a brief turn and talk. Then, explain to students that they will be looking at some other groups who have used the Fourteenth Amendment in an effort to gain civil rights. Distribute the chart “**Extending the Rights of Citizenship -- Fourteenth Amendment**” located in the *Supplemental Materials (Unit 5, Lesson*

- 8). Explain to students that they will be reviewing the information on the chart and working with a partner to rank each group in terms of success in achieving civil rights, with 1 being the most successful and 6 being the least successful. Allow students about 15 minutes to review the chart and to evaluate the success of each group with their partner. **Teacher Note:** Do not define success for the students. Each pair should create their own criteria for determining success of the groups. If students are struggling with this, ask students to think about the reasons why they ranked some higher than others. These reasons are really the student's criteria for success. Also note that additional information about the groups listed on the chart has been included in the **"Extending the Rights of Citizenship – Teacher Background Notes,"** located in the *Supplemental Materials (Unit 5, Lesson 8)*.
6. Combine the pairs into groups of six students each. Have each pair explain their ranking and the criteria they used to determine success to their group. After all pairs have had a chance to share with the group, have each group report out similarities and differences in rankings and criteria used. Probe students' thinking by posing the following optional criteria when evaluating the success:
- How long it took to achieve (remember, the Fourteenth Amendment was passed in 1868)
 - The original intent behind the Fourteenth Amendment
 - How severely the group had been discriminated against before
 - Personal connection or association with a group
 - General acceptance in society today
 - Greatest gains/biggest change
7. Next, debrief the activity with the class, asking students,
- "Do you think that the original authors of the Fourteenth Amendment intended for it to apply to these groups? Explain."*
- Students should mention that the Founding Fathers and the authors of this Amendment probably did not have in mind all of the groups we just discussed. Early Fourteenth Amendment cases have shown it took many years for the Equal Protection Clause to apply to some groups. Rather, the application of the Fourteenth Amendment has evolved over time as our society has evolved. Although discrimination against traditionally disadvantaged groups still exists in our society, under the Court's interpretation of the Fourteenth Amendment Equal Protection Clause, these groups are now at least protected by law.
8. Display the **"Quote by Thurgood Marshall"** located in the *Supplemental Materials (Unit 5, Lesson 8)* to the class. Ask students who Thurgood Marshall was. Guide them to recognize that he was the lawyer for the NAACP in the *Brown v. Board of Education* case that ended the separate but equal doctrine. He later became an Associate Justice of the Supreme Court and the first African American to serve on the highest court in the United States. Have students write reflectively in their Citizenship Notebook in response to the quote and the following questions:
- Who does Justice Marshall credit with expanding ideas of liberty, justice, and equality?
 - How might Justice Marshall's experiences have influenced his perspective of the Fourteenth Amendment?

9. Ask students to speculate what groups might argue for protection of the Fourteenth Amendment in the future. (Perhaps arguments will be made on behalf of fetuses aborted due to DNA selection in the future, etc.) The point of this discussion is to show that the Fourteenth Amendment will continue to evolve as we continue to evolve in thought and technology, etc.

Now tell students that we are going to digress a little bit and do a fun simulation on college admissions. **Teacher Note:** The next portion of the lesson addresses affirmative action, but do not clue students into this just yet.

Have students remain in their groups from the previous activity. Tell each group that they have been selected as the college admission board for Admit University ("Admit U"). Distribute the handout "**Admit University**" located in the *Supplemental Materials (Unit 5, Lesson 8)* to students. Give the students 5-10 minutes to come up with the five most important criteria for choosing students to admit to their university (i.e. SAT scores, essay, economic status, number of AP classes, etc.). Each group should consider themselves a separate university. Tell student groups that they should be prepared to justify their choices and that their choices should be listed in order of importance, with one being the most important criteria for admission to Admit U. Also remind students to be as specific as possible when determining their entrance criteria (i.e. instead of saying good grades, what GPA do they desire).

10. Next, have each group present their top five criteria, in order of importance, providing the justification for their choices. Try to get all group members to participate, maybe having each member of the group discuss one criterion. As students present, write down the criteria they come up with on the board. Discuss with the class the following:
- What criterion seemed to be the most popular with the class? Why do you think that this was the most popular choice?
 - What criteria were mentioned only by one or a few groups? Why do you think that this was so?
 - What criteria were completely missing that other students might have assumed would be important for college admissions?
 - How important should a student's race be in a university's admissions decision? Explain.
- Teacher Note:** If students believe race should be taken into account, push their thinking by asking "How would a university go about doing so?" For example, should they have a lower GPA requirement for students of a certain race or background? Do not spend a lot of time here. Get them interested, but not in depth, as they will be tackling this topic later. You may find that as students get into this discussion you will have to cut it off, as again they will be coming back to this issue later in more detail.
11. Now bring the students back to our analysis of the Equal Protection Clause of the Fourteenth Amendment. Tell the students that you have an interesting question for them (maybe even offer small extra credit for the person who ultimately guesses correctly). Ask students what group in America now claims a violation of the Equal Protection Clause of the Fourteenth Amendment, but would not have had this claim at the time the Fourteenth Amendment was made? What is this newer claim called? If students are struggling, guide them to recognize the recent claims by whites of reverse discrimination due to affirmative action programs.

12. Have students do a brief stop and jot, writing down the term “affirmative action” and what it brings to mind for them. Then, share the following definition with the class: “Affirmative action is a policy or a program that seeks to redress past discrimination through active measures to ensure equal opportunity, such as in education and employment.” Explain to students that they are going to consider the issue of affirmative action under the Equal Protection Clause, focusing on university admissions policies by engaging in a debate. The issue for debate is:

Should race and/or ethnicity be used as a factor for college admissions?

13. Have students prepare for the debate. To do so, provide students with the **U.S. Supreme Court Case Summaries** in ***Bakke***, ***Grutter***, and ***Gratz*** located in the *Supplemental Materials (Unit 5, Lesson 8)*. Also distribute the “**Identifying Arguments**” handout located in the *Supplemental Materials (Unit 5, Lesson 8)*. Explain to students that as they read each case summary, they should record notes on the chart identifying some of the arguments for and against affirmative action. It may be helpful for students to highlight arguments and reasoning as they read and then record them on the handout afterward. Be sure to explain to students that they are identifying the arguments in order to determine with which side they most agree. The point here is for students to explore both sides of the issue.

Teacher Note: The chart can be completed as part of the homework or it can be completed in class with a partner. A teacher reference sheet outlining the arguments for and against affirmative action can be found in the *Supplemental Materials (Unit 5, Lesson 6)*. Additional sources providing the pro and con arguments can be found at the following websites:

http://www.balancedpolitics.org/affirmative_action.htm; and
<http://aclu.procon.org/view.answers.php?questionID=000697>.

14. Students should now be assigned to their side randomly or by seating arrangement and begin to prepare for the debate. **Teacher Note:** Students should NOT choose their side in this debate, as students can feel quite strongly about one side or the other when it comes to affirmative action and college admissions.

Explain to students that when the debate takes place, students may be arguing points that they personally believe in or those with which they disagree. To guide them in their preparation, students should complete the “**Affirmative Action Debate Preparation Guide**” located in the *Supplemental Materials (Unit 5, Lesson 8)*. **Teacher Note:** If you would like to score the debate, there is a sample scored discussion and rubric with explanation at <http://www.streetlaw.org/en/Page.Landmark.strategies.discussion.aspx>, a copy of which has been included in the *Supplemental Materials (Unit 5, Lesson 8)*.

15. Once students have prepared, have them engage in a classroom debate. Arrange the room so that students for affirmative action are on one side of the room, while the students against affirmative action are on the other side. The sides should face each other. Explain that students are expected to make at least one substantive comment. If all arguments have been exhausted before each student has had the opportunity to talk, guide students to support, extend, or challenge prior statements. Refer to the “**Affirmative Action Debate Preparation Guide**” from Step 14 with the class if necessary to prompt student thinking. One option is to have ball of yarn or spongy ball to

identify the speaker. Students toss the ball across the room to the next speaker. Be sure that students rephrase the prior speaker's statement before adding or countering it.

16. Following the debate, show students a portion of the free Harvard lecture online from "Harvard University's Justice with Michael Sandel," one of the most popular courses in Harvard's history, at <http://www.justiceharvard.org/>. The episode relating to affirmative action is Episode 9. **Teacher Note:** You will want to watch this entire episode before you use it in class and pick the portions that you would like to share with the students, especially the first 30 minutes or so. Begin the video at 1 minute and 25 second and watch the next 23 ½ minutes. This video provides students the opportunity to experience a real Harvard lecture and to see the same topic that they debated discussed by a Harvard professor and students.
17. Debrief the video by asking students to compare their classroom debate with the discussion by college students at Harvard. **Teacher Note:** Additional information for teachers can be found in the *Supplemental Material (Unit 5, Lesson 8)* in the "**Historical Background for Teachers: Civil Rights and Equal Protection.**"
18. Conclude the lesson by having students write in their Citizenship Notebook about the following questions:
- What is your personal opinion of affirmative action in college admissions? Explain.
 - How have the courts interpreted the Equal Protection Clause of the Fourteenth Amendment to both extend rights and limit power?
 - Based what you have learned about the Fourteenth Amendment, has the U.S. Supreme Court gone too far or not far enough in protecting certain groups in its interpretation of the Equal Protection Clause? Explain.

Assessment

Assessment may occur throughout the lesson. Student entries in the Citizenship Notebook in Steps 4, 8, and 18 may serve as assessments. If scored, student participation in the debate may also be used.

Reference Section

Content Expectations

- C2.1.4: Explain challenges and modifications to American constitutional government as a result of significant historical events such as the American Revolution, the Civil War, expansion of suffrage, the Great Depression, and the Civil Rights Movement.
- C2.2.2: Explain and evaluate how American, either through individual or collective actions, use constitutional principles and fundamental values to narrow gaps between American ideals and reality with respect to minorities, women, and the disadvantaged.
- C2.2.5: Use examples to investigate why people may agree on constitutional principles and fundamental values in the abstract, yet disagree over their meaning when they are applied to specific situations.

- C3.1.5:** Use case studies or examples to examine tensions between the three branches of government (e.g., powers of purse and impeachment, advise and consent, veto power, and judicial review).
- C3.2.1:** Explain how the principles of enumerated powers, federalism, separation of powers, bicameralism, checks and balances, republicanism, rule of law, individual rights, inalienable rights, separation of church and state, and popular sovereignty serve to limit the power of government.
- C3.4.3:** Explain the meaning and importance of equal protection of the law (e.g., 14th Amendment, Americans with Disabilities Act, equal opportunity legislation).
- C3.4.5:** Analyze the various levels and responsibilities of courts in the federal and state judicial systems and explain the relationships among them.
- C5.3.1:** Identify and explain personal rights (e.g., freedom of thought, conscience, expression, association, movement and residence, the right to privacy, personal autonomy, due process of law, free exercise of religion, and equal protection of the law).
- C5.3.8:** Explain and give examples of the role of the 14th Amendment in extending the protection of individual rights against state action.
- C6.1.5:** Make a persuasive, reasoned argument on a public issue and support [it] using evidence (e.g., historical and contemporary examples), constitutional principles, and fundamental values of American constitutional democracy; explain the stance or position.

Common Core State Standards for Literacy in History and Social Studies

- RH.9-10.1:** Cite specific textual evidence to support analysis of primary and secondary sources, attending to such features as the date and origin of the information.
- RH.9-10.2:** Determine the central ideas or information of a primary or secondary source; provide an accurate summary of how key events or ideas develop over the course of the text.
- RH.9-10.4:** Determine the meaning of words and phrases as they are used in a text, including vocabulary describing political, social, or economic aspects of history/social studies.
- RH.9-10.6:** Compare the point of view of two or more authors for how they treat the same or similar topics, including which details they include and emphasize in their respective accounts.
- RH.9-10.8:** Assess the extent to which the reasoning and evidence in a text support the author's claim.
- RH.9-10.9:** Compare and contrast treatments of the same topic in several primary and secondary sources.
- RH.9-10.10:** By the end of grade 10, read and comprehend history/social studies texts in the grades 9-10 text complexity band independently and proficiently.

WHST.9-10.9: Draw evidence from informational texts to support analysis, reflection, and research.

WHST.9-10.10: Write routinely over extended time frames (time for reflection and revision) and shorter time frames (a single sitting or a day or two) for a range of discipline-specific tasks, purposes, and audiences.

Instructional Resources

Equipment/Manipulative

Computer with Projector and Internet Access

Student Resource

Chase, Alycia and Jennifer Simone. *Supplemental Materials (Unit 5, Lesson 6)*. Teacher-made materials. Oakland Schools. 2012.

Fourteenth Amendment. U.S. Constitution. Legal Information Institute. Cornell University Law School. 10 Jan. 2013 <<http://www.law.cornell.edu/constitution/amendmentxiv>>.

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Gratz v. Bollinger, 539 U.S. 244 (2003). The Oyez Project. U.S. Supreme Court Media and ITT Chicag-Kent College of Law. 10 Jan. 2013 <http://oyez.org/cases/2000-2009/2002/2002_02_516>.

Grutter v. Bollinger, 539 U.S. 306 (2003). The Oyez Project. U.S. Supreme Court Media and ITT Chicag-Kent College of Law. 10 Jan. 2013 <http://oyez.org/cases/2000-2009/2002/2002_02_241>.

"Part One: Arguing Affirmative Action." Episode 09. *Harvard University's Justice with Michael Sandel*. 4 Feb. 2011. 10 Jan. 2013 <<http://www.justiceharvard.org/>>.

Remarks of Thurgood Marshall at the Annual Seminar of the San Francisco Patent and Trademark Law Association. Maui, Hawaii May 6, 1987. 10 Jan. 2013 <http://www.thurgoodmarshall.com/speeches/constitutional_speech.htm>.

Regents of the University of California v. Bakke, 438 U.S. 265 (1978). The Oyez Project. U.S. Supreme Court Media and ITT Chicago-Kent College of Law. 10 Jan. 2013 <http://www.oyez.org/cases/1970-1979/1977/1977_76_811>.

Teacher Resource

"Civil Rights and Equal Protection." *Supreme Court Drama*. Ed. Elizabeth M. Shaw. UXL-Thomson Gale, 2001. *eNotes.com*. 2006. 10 Jan. 2013 <<http://www.enotes.com/supreme-court-drama/civil-rights-and-equal-protection>>.

"Does the US need affirmative action?" ProCon. ACLU. 10 Jan. 2013 <<http://aclu.procon.org/view.answers.php?questionID=000697>>.

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<http://www.streetlaw.org/en/landmark/cases/brown_v_board_of_education>.

Brown v. Board of Education (1954). Summary of the Decision. Landmark Cases of the Supreme Court. Street Law, Inc., and The Supreme Court Historical Society. 10 Jan. 2013
<http://www.streetlaw.org/en/Page/522/Summary_of_the_Decision>.

Fourteenth Amendment. Annotated Constitution. Legal Information Institute. Cornell University law School. 10 Jan. 2013
<http://www.law.cornell.edu/anncon/html/amdt14a_user.html#amdt14a_hd1>.

Linder, Doug. *Exploring Constitutional Law*. University of Missouri-Kansas city Law School. 2001-2011. 10 Jan. 2013 <<http://law2.umkc.edu/faculty/projects/ftrials/conlaw/home.html>>.

Messerli, Joe. "Should affirmative action policies, which give preferential treatment based on minority status, be eliminated?" Balanced Politics.org. 7 January 2012. 10 Jan. 2013
<http://www.balancedpolitics.org/affirmative_action.htm>.

Plessy v. Ferguson, (1896). Landmark Cases of the Supreme Court. Street Law, Inc., and The Supreme Court Historical Society. 10 Jan. 2013
<http://www.streetlaw.org/en/landmark/cases/plessy_v_ferguson#Tab=Overview>

Plessy v. Ferguson, (1896). Summary of the Decision. Landmark Cases of the Supreme Court. Street Law, Inc., and The Supreme Court Historical Society. 10 Jan. 2013
<http://www.streetlaw.org/en/Page/436/Summary_of_the_Decision>.

Scored Discussion. Landmark Cases of the Supreme Court. Street Law, Inc., and The Supreme Court Historical Society. 10 Jan. 2013
<<http://www.streetlaw.org/en/Page.Landmark.strategies.discussion.aspx>>.