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ABSTRACT

This document is a teachers' guide to accompany the book "Equal Justice Under Law: The Supreme Court in American Life." Because the book contains a tremendous amount of detail, the guide does not attempt to explicate everything in the text. Instead the guide attempts to provide more detail on one or more of the issues covered in different sections or topics in the book. Included are summaries of key cases, background on the controversies of a particular period, and suggestions as to how other materials in the sections might be taught. The guide is not designed to provide definitive answers to the issues raised by the Supreme Court's history, but to suggest the rich array of cases and controversies dealt with by the Court throughout its history. The guide includes a bibliography, glossary, chapter on case study methods, and a discussion of moot courts. The material in this document has been arranged into topics, organized to follow the sequence of the text. Several topics depart from the basic chronological scheme to explicate subjects such as the idea of constitutionalism, the structure of the judicial system, and milestones in Supreme Court history. Each topic offers one or more methods of instruction designed to encourage informed discourse and active student participation. Each topic contains a lesson highlight section that features a subject and strategy that can be taught separately if necessary. For nonchronological courses the guide suggests highlights in subject matter, issues, and concepts including power, property, liberty, equality, and justice. (DK)

ED 364 484

Instructor's Guide to

EQUAL JUSTICE UNDER LAW

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Instructor's Guide to

EQUAL JUSTICE UNDER LAW

Written by
ISIDORE STARR
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American Bar Association
Public Education Division

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To Instructors

And to those who labor at that task of educating Americans it becomes, year by year, more evid that the Supreme Court has a large part to play in our national teaching. That Court is commissioned to interpret to us our own purposes, our own meanings. To a self-governing community it must make clear what, in actual practice, self-governing is. And its teaching has peculiar importance because it interprets principles of fact and of value, not merely in the abstract, but also in their bearing upon the concrete, immediate problems which are, at any given moment, puzzling and dividing us. But it is just those problems with which any vital system of education is concerned. And for this reason, the Court holds a unique place in the cultivating of our national intelligence. Other institutions may be more direct in their teaching influence. But no other institution is more deeply decisive in its effect upon our understanding of ourselves and of our government.

Alexander Meiklejohn
Free Speech (1948) p. 32

Isidore Starr is a lawyer/educator who is widely regarded as the father of the law-related education movement. He taught high school social studies for many years in the New York City schools and later became a professor of education at Queens College in New York. He is a former president of the National Council for the Social Studies and has written dozens of articles and books about law and education.

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A number of secondary school teachers, university professors, and other educators reviewed and field-tested an early draft of this manuscript. They include Margaret Branson, Joan Byer, Nancy S. Cousins, David Fink, Faye Adele Hughes, James G. Lengel, Rosemary V. Miller, David Naylor, Paula Steinmetz, and Charles A. Thompson. Their suggestions improved the book in countless ways, and we thank them for lending their time and expertise to the project.

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Finally, special appreciation is extended to the American Bar Association which funded the preparation and printing of this book. Its grant support brought an exciting idea to life, and we extend deep gratitude to the officers, volunteers, and staff of the Association for their many contributions to this effort.

Norman Gross
Director
Public Education Division

Introduction

Equal Justice Under Law: The Supreme Court in American Life represents an impressive achievement. It covers the highlights of almost 200 years of Supreme Court history in 161 pages. No space is wasted from the front cover picture of the west entrance of the magnificent building to the back cover view of its eastern facade. Between the covers is a rich array of pictures, paintings, and cartoons connected by a narrative of events, personalities, and landmark cases which have made the Supreme Court the unique institution that it is today.

Instructors who plan to use this book with secondary school students or in adult education classes may find that too much has been covered too quickly and that important events and landmark rulings have been summarized too briefly. It is with this thought in mind that this *Instructor's Guide* has been prepared. It does not attempt to explicate everything in this tightly packed little book. To do that would require an instructor's guide far longer than the book. Rather, in each topic we have attempted to provide more detail on one or more of the issues covered in a section of the book—summaries of key cases, background on the controversies of a particular period, etc.—and to provide suggestions as to how the other material in that section may be taught.

It must be stressed that this book is not designed to provide definitive answers to the many issues raised by the Court's history. Nor does it in any sense represent official positions of the American Bar Association or the Supreme Court Historical Society. Its purpose is to suggest the rich array of cases and controversies dealt with by the Court over the years, and to help instructors and their students explore fully the rich dimensions of the Court's history. Each of its topics should be approached as a means of beginning discussion, not as an attempt to end it by providing definitive conclusions.

To make instructors aware of other resources, each presenting its own view of the Court's work, the bibliography in Appendix D contains a brief list of books and other materials. These range from scholarly work to materials intended for the general reader. These lists are not meant to be all-inclusive, but to briefly note some of the many works which would be helpful.

Some of the sources cited on these lists provide summaries of Supreme Court decisions. We have drawn on these summaries for a number of our topics, so that instructors may sample the wide variety of approaches available to presenting Supreme Court cases. We have also given citations for cases discussed, in the event that instructors wish to read the full decision.

To further assist instructors, we have included a glossary of terms (with their pronunciations), a chapter on case study methods (including a brief guide to legal research), and a discussion of moot courts. All of these can be found in the appendices.

For teaching purposes, the material in the book has been arranged into topics, organized to follow the sequence of the text, each of which may require one or more hours of instruction. Several topics depart from the basic chronological scheme to explicate such subjects as the idea of constitutionalism, the structure of the judicial system, and milestones in Supreme Court history.

Each topic offers one or more methods of instruction designed to encourage informed discourse and active student participation in understanding and appreciating the role of our High Court as it seeks to adapt our Constitution "to the various crises of human affairs."

The guide should thus be used as a supplement to both the book and to the knowledge and experience which you the instructor bring to the topic. Doubtless, there will be topics and strategies which are more appropriate for some classes than for others; in addition, it is not anticipated that most instructors will have the opportunity to cover all of the material contained in these pages. For ease of reference and use, therefore, the "Lesson Highlight" section of each topic features a subject and strategy which can be taught separately if necessary. It is hoped, however, that whatever the application of the guide to your particular needs and interests, it will provide the stimulus and basis for many

ideas and insights about the Supreme Court which will enrich your classroom instruction in this critical area.

A word about organization. *Equal Justice* is generally organized chronologically, as is this guide. It is ideally suited, then, to supplement American History courses. The material may also enrich government and other courses as well, however. To facilitate its use in courses which are not chronological, we suggest the following breakdowns:

1. Subject Matter Highlights

The Judiciary: all topics, but especially topic 3 (judicial review), topics 2, 3, and 16 (individual justices), topics 2 and 8 (appointments to the Court), and topic 16 (structure of the federal judiciary)

The Presidency: topics 3, 8, and 14 (executive privilege)

Congress: topics 8, 14

The Constitution and Constitutionalism: topics 1, 3, 4, 14

- Separation of Powers (topics 3, 14)
- Checks and Balances (topic 1)
- Due Process Guarantees (topics 13, 15)
- First Amendment Issues (freedom of speech, topic 7; freedom of the press, topics 7, 12; freedom of religion, topics 9, 11)
- Equal Protection (topics 9, 10, 15)
- The Right to Privacy (topic 15)
- The Commerce Clause (topics 6, 8, 10)
- The Contract Clause (topic 4)
- The Supremacy Clause (topic 3)

Economic Regulation

- Antitrust (topic 6)
- Labor/Management (topic 8)

2. Issue Highlights

Political Issues: voting rights (topic 5); one person/one vote (topic 10); impeachment (topic 14); executive privilege (topic 14); conflict between the Court and the president (topics 3, 8, 14)

Social Issues: abortion (topic 15); racial discrimination, including affirmative action and reverse discrimination (topics 5, 9, 10, 15); discrimination against women (topic 10); school prayer and aid to parochial schools (topic 11); pornography/obscenity (topic 12)

Constitutional Issues (in addition to those listed under other topics): free speech (topic 7); free press, (topics 7 and 12); religious freedoms/establishment of religion (topics 9 and 11)

Criminal Justice Issues: right to counsel (topic 13); capital punishment (topic 15); search and seizure (topic 13); right to remain silent (topic 13)

Economic Issues: topics 6 and 8

Other Issues: effect of war on courts and the law (topics 7 and 9)

3. Concept Highlights

Isidore Starr has identified five key ideas which wend their way through the Constitution and through American History. These are:

Power (the concept that is mentioned most frequently throughout the Constitution, forming the basic ingredient for governmental behavior): topics 3, 4, 6, 8, and 14

Property (a concept that is mentioned very frequently thoughout the Constitution): topics 3, 4, 5, 6, and 8

Liberty (as it relates to First Amendment freedoms of religion, speech, press, assembly): topics 7, 9, 11, 12, and 15

Equality (a concept that applies to the "Extended Bill of Rights" in the 13th, 14th, 15th, 19th, 24th, and 26th amendments): topics 5, 10, and 15

Justice (a concept relating to due process of law as mentioned in the 5th, 6th, 8th and 14th amendments): topics 13 and 15

As we approach the Bicentennial of the drafting of our Constitution in 1987 and the Bicentennial of the ratification of our Bill of Rights in 1991, this book will take on an added importance.

It is certainly basic to American education that students in our schools and citizens in our communities understand what is meant by the rule of law and the role of the Supreme Court in interpreting the supreme law of the land. If this guide will help somewhat in the task of cultivating greater understanding and appreciation of both the Supreme Court and its constitutional responsibility of interpreting the law, it will have more than served its purpose.

TOPIC

1

Constitutionalism

No man is above the law and no man is below it.

—Theodore Roosevelt

Objectives

1. To define constitutionalism and the rule of law—the basis of the power invested in the Supreme Court—and to explore their impact on United States history and society.
2. To discuss why the Constitution has endured for nearly two centuries.

Reading Assignment

Foreword and pp. 6-13, *Equal Justice Under Law.*

This section covers a number of important topics: The tradition of written colonial charters, the Mayflower Compact with its promise to "enact just and equal law," the Articles of Confederation (our first constitution for all the states), and finally the present Constitution. Each of these topics warrants careful attention. Our focus in this lesson will be on the idea of constitutionalism and on elements of the U.S. Constitution which may have contributed to its durability.

Background

Our Constitution is the oldest living written constitution in the world, what one modern authority has called "one of America's major contributions to Western culture." (Some scholars prefer to use the term "single document constitution," instead of "constitution." Great Britain's "unwritten" constitution consists of a number of landmark written documents including the Magna Carta). The United States Constitution has survived for two centuries because it has proven adaptable to changes within society without sacrificing the basic principles of the Founders. As Chief Justice John Marshall said, "We must never forget that it is a *constitution* we are expounding. . . intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."

The Constitution has also survived because the American people have supported it and the concept of a constitution. According to historian Paul Murphy, writing in the Spring, 1982, issue of the magazine *Update on Law-Related Education*, "constitutionalism means government limited by the rule of law. It is the idea that governments exist only to serve specified ends,

and properly function only according to specified rules." (*Webster's* defines constitutionalism as "the doctrine or system of government in which the governing power is limited by enforceable rules of law and concentration of power is prevented by various checks and balances so that the basic rights of individuals and groups are protected.")

Murphy goes on to note that constitutionalism implies mutual rights and responsibilities, but above all it places limits on power and sets forth designated processes to assure those limits. Therefore, the hallmark of modern constitutionalism is its reliance upon formal rules and limitations – limitations which are in turn directly tied to popular sovereignty.

Murphy writes that a modern constitution is expected "to define society's political institutions, and to establish standards for evaluating them. This, in turn, is expected to reflect the popular will. In this way something of the force of tradition and shared experience are captured, while, at the same time, current challenges can be dealt with through an appropriate rule of law.... Citizen participation, then, becomes central if modern constitutionalism is to prevail."

In the United States experiment with constitutionalism, no one is above the rule of law or exempt by virtue of "divine right." Americans have long insisted that rulers were not over the ruled. This ingrained belief, Murphy writes, eventually swept Richard Nixon from the highest office in the land.

Questions/Strategies

1. Our Constitution and Bill of Rights have survived for almost two hundred years despite:
   - foreign wars and a devastating civil war
   - periodic "cold wars"
   - economic panics, recessions, and depressions
   - domestic violence
   - westward expansion and population growth
   - corruption and unethical conduct by public officials

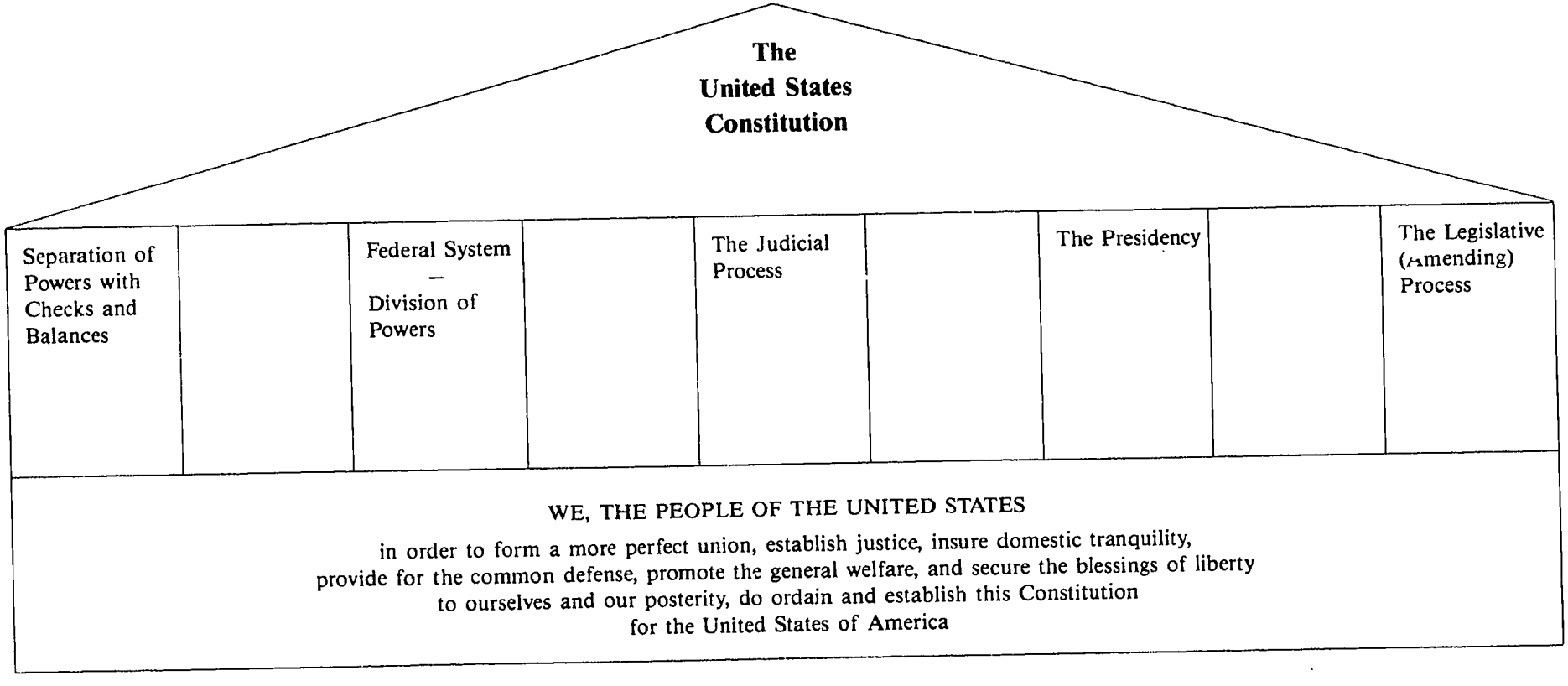
   In the face of these historic challenges, how can you explain the fact that our Constitution and Bill of Rights have survived relatively unchanged for almost two centuries?
2. Refer students to the Constitution and Bill of Rights. Have them identify those provisions which underlie our system of checks and balances, federalism, and individual rights.
3. Distribute copies of a weekly news magazine such as *Time* or *Newsweek* to the students. Have them prepare a collage depicting the concept of constitutionalism.
4. This section of the instructor's guide presents several definitions of constitutionalism. Have students research other definitions and discuss which of the various definitions seems to best capture the essence of the term.
5. Constitutions are not in and of themselves self-executing; they depend upon the tacit support of the populace, upon constituents' support of their elected officials. Draw the class' attention to the etymological similarity between "constitution" and "constituent." Discuss with students the implications of being a constituent. Besides voting and making contributions to the political process, how else do "constituents" support the Constitution?
6. Have groups of students research different periods of American history and report on the demographics, major issues, and significant events of each period. Then, ask students how various interpretations of and additions to the Constitution over the years reflect changes in American society and in what the constituents would or would not support.

LESSON HIGHLIGHT

Draw the diagram appearing in this topic on the board, label the base and the top and ask students to identify the columns which hold up the structure. Although the diagram only has five columns, there is no reason to limit discussion to these five. Some possible responses have been included for your reference.

Show how each of the columns contributes to the strength of the building or temple. Has any one of the principles which we have examined played a more important role than the others in helping our Constitution survive the past two centuries? (Also, see topic 4 for a discussion of power under the Constitution.)

A continuum can show the most important and the least important principles. Have students take positions along the diagram, standing in front of those guarantees they consider most important, and encourage them to persuade others to leave their position and join them at their place on the line. Prepare a summary of the continuum they form at the conclusion of the exercise. This will indicate which principles the students considered most important and which is least important. After studying subsequent sections of the book, present the summary to the students and ask them what changes, in any, they would make and why.


The
United States
Constitution
Separation of Powers with Checks and Balances
Federal System – Division of Powers
The Judicial Process
The Presidency
The Legislative (Amending) Process
WE, THE PEOPLE OF THE UNITED STATES
in order to form a more perfect union, establish justice, insure domestic tranquility,
provide for the common defense, promote the general welfare, and secure the blessings of liberty
to ourselves and our posterity, do ordain and establish this Constitution
for the United States of America

TOPIC

2

The Court's Early Years

Laws are dead letters without courts to expound and define their true meaning and operation.

—*Federalist Papers*

Objective

To review the birth of the Court as an institution and to focus on its early cases.

Reading Assignment

Equal Justice Under Law, pp. 15–24.

Background

These pages are rich in historical detail. The Supreme Court is brought into being by the Judiciary Act of 1789, and John Jay becomes the first chief justice of the United States. He is joined by five associate justices. The justices meet in an unimpressive setting in New York, the temporary capital, then in Philadelphia, and finally in Washington, D.C. Cases are slow in reaching the high tribunal and only gradually do the justices begin to make their impact on American life.

Questions/Strategies

1. The original Court consisted of six justices from the states of New York, Virginia, Massachusetts, Pennsylvania, North Carolina, and South Carolina. According to Article III of the Constitution, what are the qualifications for federal judges and members of the Supreme Court? What conclusions, if any, can be drawn from the fact that the first justices came from these six states? (Article III mentions virtually no qualifications. Justices do not even have to be lawyers, though in fact all have been. Then, as now, political considerations influenced the judges' selection. The first four states listed were the most populous of the time. A geographical balance was also maintained: three justices were selected from northern states and three from southern states.)
2. In his book, *The Supreme Court and its Great Justices*, Sidney Asch notes that the original justices shared "a passion for the Federalist Party, a conservative philosophy, and a bias in favor of property interests." Asch then proceeds to offer less than flattering perspectives on the justices, excerpts of which include the following:

- John Jay—"The seat of the Chief Justice represented another varied interest to John Jay. Thus, he twice ran for Governor of New York without stepping from his post on the bench. And when finally he was elected governor, he casually resigned from the Supreme Court."
- John Rutledge—"Rutledge succeeded in having inserted into the Constitution a provision that protected the slave trade for an additional twenty years . . . He never actually sat on the Court. In February, 1791, Rutledge resigned to become chief justice of the South Carolina Court of Common Pleas."
- James Wilson—"Wilson was a pre-Revolution pamphleteer, a signer of the Declaration of Independence, a member of the Constitutional Congress, a moving force at the Constitutional Convention, a successful lawyer, a fantastic promoter and business enterpreneur, a professor of law, and a legal writer. Yet, from these great heights he was to plummet to the depths when his financial manipulations failed.... Wilson ended his days dodging auditors and running to avoid the debtor's jail."
- William Cushing—"[A] former chief justice of the Supreme Court of Massassachutts and a descendent of a distinguished family of lawyers, he was totally undistinguished himself. And yet, as luck would have it, he was to spend twenty years on the Supreme Court, double the tenure of any other Justice then sitting on the Court."
- John Blair—"[Blair] was inconspicuous both as a delegate to the Constitutional Convention and as a Virginia judge. He did, however, attain a great financial success by speculating in government bonds...Yet the most significant factor in his background leading to the Supreme Court appointment was his friendship with President Washington."
- James Iredell—"His sole judicial experience was as a pedestrian lower court judge in North Carolina. Although young, his appointment was a political reward for his successful efforts as head of the North Carolina Federalists, dragging his home state into the new nation."

Have students conduct research into each of these justices and the early years of the Court. To what extent are Asch's descriptions of their backgrounds accurate? Did their backgrounds have an impact on the early actions of the Court? (Consider the actions described below in responding to this question.)

3. In one of their first acts, Chief Justice Jay and his five associates refused to hand down an advisory opinion. This established the precedent that the Court would rule only on specific cases that come before it. What is an advisory opinion? In your judgment, is this a desirable decision? (An advisory opinion is a nonbinding opinion relating to a question of law submitted by a legislative body or government official but not yet presented in an actual case. As to the desirability of the Jay Court's decision, we can look at this issue from two perspectives. On the one hand, refusing to submit an advisory opinion limited the extent to which the Court's knowledge, expertise, and power could be used. The Court must wait for "cases" and "controversies" to be brought to it. However, such a refusal meant that when the Court speaks, it speaks with authority. Its decisions matter because they resolve actual disputes. The Court is not a shadow Cabinet with no voice or with one that could be easily overruled.)
4. The case of *Chisholm v. Georgia* [2 Dallas (2 U.S.) 419 (1793)] resulted in the ratification of the Eleventh Amendment, overruling the Court's decision in the case. This was the first time that an amendment was used to nullify a Supreme Court decision. What were the facts in the case and the Court's decision? (See pp. 15–16 of *Equal Justice*). How did Amendment 11 change the ruling? Studying the amendments to the Constitution, can you identify any other amendments which overruled Supreme Court decisions? (Amendments 13 and 14 overruled the *Dred Scott* case and Amendment 16 overruled the income tax decision.)
5. Explain the significance of the Court's ruling in *Glass v. Sloop Betsey,* [3 Dallas (3 U.S.) 5 (1794)]. (See *Equal Justice,* pp. 16–21.)
6. Why wasn't the Sedition Act of 1798 appealed to the Supreme Court on the grounds that it violated the First Amendment? (Was it because the Court had not, as yet, declared an act of Congress unconstitutional?)
7. The political confrontation at that time between the Federalists and the Republicans had an important influence on the history of the Court. Explain the impact of this confrontation.
8. Looking back at the first ten years of the Court's existence, what predictions could reasonably have been made concerning its future influence on our history?

LESSON HIGHLIGHT

Equal Justice Under Law has a wealth of pictures, illustrations, and drawings. These materials can be used to great advantage in assisting students to sense the drama of the past and to visualize the individuals and the events which meshed into a panorama of American justice in action.

Have the students read the documents and look at the pictures that appear on pages 14 and 17. Ask them to do a little detective work using these sources. As they respond to the following questions, have the students tell how they came to that conclusion and which source(s) contained the information.

- On what date did the article appear in the *New York Daily Advertiser*? (Wednesday, February 3, 1790—while the newspaper clipping does not provide this date, it says that the Court convened "yesterday." The official record is dated February 2, 1790.)
- Which document tells where the Court met? Why did they move?
- Who were the observers on the first day the Court met?
- What evidence do these materials provide to suggest that many people in the area would be aware that the Court had convened?
- How many associate justices attended the second day of the session? Who was the newcomer?
- Who wrote the official record? (Note that we cannot see a signature but that the newspaper article does give the name of the clerk.)

TOPIC

3

John Marshall: The Great Chief Justice

If American law were to be represented by a single figure, skeptic and worshipper alike would agree without dispute that the figure could be one alone, and that one, John Marshall.

—Justice Oliver Wendell Holmes

Objectives

1. To develop an understanding and appreciation of John Marshall's contributions to the role of the Supreme Court in American history.
2. To explain how the Court exercised the power of judicial review, the basis for its standing as a co-equal branch of government.
3. To introduce the concept of power.
4. To introduce the case study method.

Reading Assignment

Equal Justice Under Law, pp. 24–41.

In the space of a few decades, the Court went from a weak institution with little respect to one that had the power to nullify not just the work of the other two great branches of federal government, but the work of the state governments and state court systems.

Background

(The accomplishments of the Marshall Court and several of its most important cases are discussed by historians James G. Lengel and Gerald A. Danzer in an article which appeared in the Winter, 1984, issue of *Update on Law-Related Education.* That article, in turn, was adapted from the authors' book, *Law in American History* (Glenview, IL, Scott Foresman and Co., 1983). The "Background" and "Case Study" sections of this topic are taken from the *Update* article.)

Some of Marshall's accomplishments during his 34 years on the Court are:

- *Judicial independence:* He freed the Court from undue dependence on the other branches of government. Only when the judiciary was considered a separate and distinct branch of government could it really play an effective role in the system of checks and balances.
- *Judicial review:* He established the Court's ability to declare that the acts and actions of the other branches, and of the states as well, were contrary to the Constitution and therefore null and void.

- *Judicial sovereignty:* He established that within its sphere of authority the Supreme Court would be accepted as the highest authority and the other branches of the government would accept its decisions as binding.

Before John Marshall became chief justice, each member of the Court wrote a separate opinion on each case. Marshall changed this. Under his leadership, one justice usually wrote the decision for the majority point of view. Each justice could, however, enter a separate concurring or dissenting opinion. Through the force of his personality as well as his position as chief justice, Marshall was often able to get the whole Court to follow his own opinion.

A few years after Marshall became chief justice, the Supreme Court moved to new and more imposing quarters in the capitol building. The move was symbolic. The Court's star was on the rise. At the end of Marshall's career a quarter century later, it had become the strong, independent and respected third branch of the federal government.

"If America was to live and grow as a nation," a historian observed a century after Marshall's death, "if conflicting sectional interests were to be reconciled, if natural forces, both geographic and economic, which were making for nationalism, were to prevail, then no trivial and constricted construction of the Constitution should stand in the way." (Andrew C. McLaughlin, *Constitutional History,* 1935) The achievement of the Marshall Court was, in a series of decisions, to interpret the Constitution broadly. Marshall and the other justices used its provisions to defend individual property rights and the power of the federal government, usually at the expense of the states.

In this, Marshall and his colleagues swam with the larger historical currents of the nineteenth century. Throughout the world, the tendency was toward larger and more powerful national governments. Marshall, by his decisions, was often unpopular in his day. But people came to agree with his approach as time went by. His successor tried to reverse direction and swim against the current. One result was a Civil War.

News of Marshall's death reached an editor in New York City—one who had defended states' rights and the "democratic principle" that people should decide issues on a local level. He had violently objected to many of the Supreme Court decisions. Although holding "a proper sentiment for the death of a good and exemplary man," the *Evening Post* was glad to see Marshall's absence on the nation's highest bench. The editor wrote:

> The Philadelphia papers of yesterday bring us intelligence of the death of Chief Justice John Marshall, of Virginia, in the eightieth year of his age. He retained his faculties to the last, and a few days before his death is said to have composed an inscription for his own tomb.
>
> Judge Marshall was a man of very considerable talents and acquirements, and great amiableness of private character. His political doctrines, unfortunately, were of the ultra-federal or aristocratic kind. He was one of those who, with Hamilton, distrusted the virtue and intelligence of the people, and was in favor of a strong and vigorous general government, at the expense of the rights of the states and of the people. His judicial decisions of all questions involving political principles have been uniformly on the side of implied powers and a free construction of the Constitution, and such also has been the uniform tendency of his writings.

Case Studies

Marbury v. Madison. William Marbury was appointed by President John Adams to be a federal justice of the peace, just as Adams was about to be succeeded by the newly-elected Thomas Jefferson. Marbury was one of several appointments of Federalists Adams had made during his last hours in office. Time was short. Most letters of appointment were delivered to the appointees. But some were still on the secretary of state's desk the next day when the new administration took over. Marbury expected to receive his commission (official letter of appointment) from James Madison, Jefferson's new secretary of state. But Madison had been told by Jefferson *not* to deliver the commission to Marbury.

Marbury filed a suit in the United States Supreme Court against Madison. A clause in the federal Judiciary Act of 1789 gave the Supreme Court the power, under its original jurisdiction, to force the executive branch to carry out its duties, so Marbury thought the Court could help him get his commission.

The case presented Marshall and the other justices with enormous political problems. The Supreme Court was composed of Federalists, and this dispute was, at heart, a naked partisan dispute between the Federalists—trying to appoint as many office holders as possible in the waning moments of Adams' regime—and the newly powerful Republicans, trying to solidify their hold on the political reins.

If the deciding justices allowed themselves to be brought into this partisan dispute, they ran the risk of

fatally weakening the Court. As one of the few institutions still controlled by the Federalists, the Court had little political power and could not hope to prevail in a purely political fight. A way had to be found to lift the dispute above politics, to give the Court the moral and legal authority to enforce its decision.

It was Marshall's genius to use the unpromising case of *Marbury v. Madison* [1 Cranch (5 U. S.) 137 (1803)], to assert the Supreme Court's most important power — its ability to declare a law unconstitutional.

In reviewing the case, John Marshall realized there was a problem with the clause in the 1789 Act. It conflicted with the United States Constitution.

According to Article III, section 2, of the Constitution, the Supreme Court has original jurisdiction in cases "affecting Ambassadors, other public Ministers, and Consuls, and those in which a State shall be a Party." Marbury was not an ambassador, public minister, or consul, and his case did not involve a state. To issue the court order that Marbury requested would have expanded the Supreme Court's original jurisdiction. That would have gone against the Constitution. So Marbury's request was allowed by federal law but was not allowed by the Constitution.

Thus, the Supreme Court unearthed the buried problem: *Who decides* whether a law is in keeping with the Constitution? In its long decision in Marbury's case, the Court declared that from here on in the 1789 law was null and void; further, it held, the Supreme Court had the power to decide whether or not a law passed by Congress was "unconstitutional."

> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an Act of the Legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. . .
>
> It is emphatically the province and duty of the judicial department to say what the law is. . . .Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. . . .The Constitution is superior to any ordinary act of the legislature; the Constitution, and not such any ordinary act, must govern the case to which they both apply. . . .
>
> Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions.

In essence, Marshall handed Jefferson and the Republicans a hollow victory. They were able to deny Marbury his commission, and keep one more Federalist out of office. And the Supreme Court denied itself a power granted to it by the federal law. But the case was later used to claim a far more major power for the Court — one that would ultimately make it an independent branch of government of equal importance to Congress and the presidency.

Marbury v. Madison established the Court's power to overrule a federal law that was not in keeping with the Constitution.

McCulloch v. Maryland. McCulloch was the cashier of the Bank of the United States at its office in Baltimore, Maryland. One day, he received a bill from the Maryland state government for $14,000. This bill was for taxes the Maryland legislature had recently decided to levy on newly opened federal banks in the state. Although these banks handled the federal government's banking business, they were privately owned. Thus, they were in direct competition with state banks.

McCulloch refused to pay the tax bill. He and other bank officials felt that Maryland had no right to lay a special tax on the federal government's bank — they thought that the Constitution did not allow a state to pass a law that would impede the federal government.

Maryland sued McCulloch in state court, and won. McCulloch appealed to the Maryland Court of Appeals, but the state won there too. He then appealed to the United States Supreme Court.

In *McCulloch v. Maryland* [4 Wheaton (17 U.S.) 316 (1819)], the Court held that McCulloch did not have to pay the bank tax to Maryland because the law that levied the tax was unconstitutional. [Editor's note: According to James Bradley Thayer's biography of John Marshall (Chicago: The University of Chicago Press, 1967), the Court's reasoning in *McCulloch* was as follows: "The questions were, first, whether the United States could constitutionally incorporate a bank; and, second, if it could, whether a State might tax the operations of the bank; as, in this instance, by requiring it to use stamped paper for its notes. The bank was sustained and the tax condemned. In working this out, it was laid down that while the United States is merely a government of enumerated powers, and these do not in terms include the granting of an incorporation, yet it is a government whose powers, though limited in number, are in general supreme, and also adequate to the

great national purposes for which they are given; that these great purposes carry with them the power of adopting such means, not prohibited by the Constitution, as are fairly conducive to the end; and that incorporating a bank is not forbidden, and is useful for several ends. Further, the paramount relation of the national government, whose valid laws the Constitution makes the supreme law of the land, forbids the States to tax, or to 'retard, impede, burden, or in any way control' the operations of the government in any of its instrumentalities."]

The last clause in Article I, section 8, of the Constitution says Congress can "make all laws. . . necessary and proper for carrying into execution its. . . powers. . . ." Two of its powers are to tax and borrow money. The Supreme Court interpreted this clause broadly to mean that setting up banks was "necessary and proper" for Congress to carry out its functions.

The Maryland legislature had no right to pass a law that violated the Constitution. The Maryland tax law, according to the Court, was thereafter null and void. The decision further declared that the United States Supreme Court had the power to declare *state* laws unconstitutional.

> In discussing this question, the counsel for the State of Maryland. . . deemed. . . the Constitution . . . not as emanating from the people, but as an act of sovereign and independent states. [He says] the powers of the general Government. . . are delegated by the *States*, who alone are truly sovereign; and. . . who alone possess supreme dominion.
>
> It would be difficult to sustain this proposition. [The Constitution] was submitted to the *people*. They acted upon it. . . by assembling a convention . . . of the people themselves. From these conventions, the Constitution derives its whole authority. The Government proceeds directly from the people. . . . The Constitution, when thus adopted, was of complete obligation, and bound the State sovereignties. . . .
>
> . . . The Constitution, and the laws made in pursuance thereof, are supreme; . . . they control the Constitution and laws of the respective States . . . and cannot be controlled by them. . . . The power to tax involves the power to destroy. . . . If the States may tax one instrument. . . they may tax any and every other instrument. They may tax the mail, . . . the mint. . . . They may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.
>
> . . . The States have no power. . . to in any manner control, the operations of the Constitutional laws enacted by Congress. . . . We are unanimously of the opinion that the law passed by the legislature of Maryland, imposing a tax on the Bank of the U.S., is unconstitutional and void.

Cohens v. Virginia. Another of Marshall's great cases has humble origins. Virginia had passed a law that made selling lottery tickets illegal. The federal Congress, meanwhile, had passed a law that allowed selling lottery tickets in the District of Columbia. P. J. and M. J. Cohen were arrested in Virginia for selling lottery tickets. At their trial, they argued that the federal law superseded the state law. They were, nonetheless, convicted by the Virginia courts.

They appealed to the United States Supreme Court, which has appellate jurisdiction in cases involving federal law. The Cohens argued that the Court could properly hear the case on the grounds that this case was a conflict between state and federal law. But the state of Virginia argued that the Supreme Court had no authority to review state court decisions, even if they did involve federal law. According to Virginia, it was the right of a state, not the Supreme Court, to decide whether its laws were in keeping with federal law or the Constitution.

This case is known as *Cohens v. Virginia* [6 Wheaton (19 U.S.) 264 (1821)]. The Cohen brothers, according to the Court, were properly convicted. But the main point, the Court reasoned, was that Virginia *could not* tell the United States Supreme Court which cases it could consider and which it could not. The Court had the power to take appeals from any court, state or federal, if the Court wanted to and if the Constitution permitted it.

> That the United States form, for many and for most important purposes, a single nation, has not yet been denied. In war we are one people. In making peace we are one people. In all commercial regulations we are one and the same people. In many other respects the American people are one, and the Government which is alone capable of controlling and managing their interests in all these respects is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a union: and for all these purposes her government is complete; to all these objects it is competent. The people have declared that in the exercise of all the powers given for these objects it is supreme. It can, then, in electing these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the

Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate.

This [Supreme Court] was created...[for] the preservation of the Constitution and laws of the United States.... Therefore we find this [court] invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this....

[The Supreme Court] can decide on the validity of the Constitution or law of a state.... It should also be empowered to decide on the judgment of a state [court] enforcing such unconstitutional law.... The exercise of the appellate power over those judgments of the state [courts] which may [contradict] the Constitution ...is, we believe, essential.... The court of the nation [has] the power of revising the decisions of local [courts]....

The Court believed that it must be the supreme judge, or there could be as many interpretations of the Constitution as there were states. Furthermore, the Court held, it had the authority to hear appeals from state courts when the cases involved questions of federal law or involved the United States Constitution.

Thus, the *Cohens v. Virginia* decision established a principle that provided consistency to the whole court system. Once the Supreme Court had spoken on an issue, all courts had to agree in their rulings on this question. If they did not, their decisions could be appealed and overturned by higher courts.

Notice also that in this case, as in *Marbury*, the Court gave a powerful litigant an empty victory. It is true that the Court permitted the conviction of the Cohens to stand, but that was not the real issue. By asserting that the United States Constitution permitted the Supreme Court to review the decisions of state courts, the Court added considerably to its arsenal of power.

Questions/Strategies

1. Three great Marshall Court cases—*Marbury v. Madison, McCulloch v. Maryland,* and *Cohens v. Virginia*—are summarized above. Each had a major impact in establishing the role of the Court. Using the case study method, have students analyze and discuss each of these cases. The chart in this topic can then be used to compare and contrast these decisions.

   The Case Study Method. For years law schools have used the case study method to analyze cases. A full guide to the components and use of the case study method appears in Appendix B. Briefly, the components of this method are:

   - Statement of the *facts* in the case.
   - Identification of the *issues,* generally stated in the form of a question or questions.
   - Presentation of the *opposing arguments* on each side of the issue.
   - The *decision* of the court.
   - The *opinion* of the court. (This includes the reasons given by the justices in support of the decision. When there are concurring or dissenting opinions, they too should be included.)

2. Ask students to speculate on the effect of the Marshall Court's practice of issuing majority opinions, as opposed to individual opinions by each judge. Does this give the decisions more weight? Is the reasoning they jointly agree important to making Court decisions acceptable to both the public and diverse political factions? If so, does this have anything to do with our reverence for the rule of law?
3. Explain how Marshall's decisions helped create a unified America and a stronger federal government, but at the expense of the states and of local rights. Was that good for the country? What would have happened if the federal government and its courts did not have the powers they gained through Marshall's decisions?
4. The commentary quoted from the *New York Evening Post* on Marshall's death points out that he interpreted the Constitution freely and found in it implied powers. What does this mean? Can you see examples of it in the cases you have studied? Is this an appropriate way to interpret the Constitution, or is it an abuse of the Constitution and constitutional government?
5. The principle of judicial review—the idea that the Court has primary responsibility for interpreting the Constitution—has arisen in other confrontations among branches of government. See especially the case of *U.S. v. Nixon,* discussed in Topic 14.

LESSON HIGHLIGHT

Show the film, *Marbury v. Madison,* produced by the Judicial Conference of the United States in association with the Public Broadcasting Service's national production center at WQED (Pittsburgh). Before showing the film, teachers should preview it to decide where the film could be stopped for class discussion. For example, the film can be divided into the parts of the case study: facts, issues, arguments, decision, opinion, and importance as a precedent.

(For information on rentals and purchases of this film, contact: National Audiovisual Center, General Services Administration, Attention: Order Section, Washington, D.C. 20409, (301) 763-1896. A detailed teaching guide is also available for $1 from Educational Services, WQED, 4802 5th Avenue, Pittsburgh, Pennsylvania 15215. Other films in this series are *McCulloch v. Maryland, Gibbons v. Ogden,* and *United States v. Burr.* Each of these films has great merit and should be of interest to the students.)

Should the films be unavailable, teach from the summaries of the cases given in this topic. Note particularly the words quoted from the actual decisions. They clearly lay out the theory of judicial review, the most important doctrine developed by the Court. Each of Marshall's great rulings are marked by passages deserving of attention through reading aloud and through class analysis of the ideas.

John Marshall's Great Rulings

Case	Facts	Issue(s)	Plaintiff's Arguments	Defendant's Arguments	Decision and Opinion	Importance of the Ruling
Marbury v. Madison (1803)						
McCulloch v. Maryland (1819)						
Dartmouth College v. Woodward (1819)						
Cohens v. Virginia (1821)						

TOPIC

4

Power, the Constitution, and the Court

> In the nations of Europe, the courts of justice are called upon to try only the controversies of private individuals, but the Supreme Court of the United States summons sovereign powers to its bar....
>
> —Alexis de Tocqueville
> *Democracy in America*

Objectives

(Note: this topic could also follow topic 1 by providing an example of constitutionalism in action.)

1. To reinforce the idea of constitutionalism by helping students understand how the Constitution both *grants* and *limits* power.
2. To introduce the concept of property.

Reading Assignment

Foreword and page 13, *Equal Justice.*

Background

The Constitution is very much about power. It was intended to remedy the weakness of the Articles of Confederation and provide for a stable, secure national government. In creating a stronger national government, the Constitution created a balance of power—among Congress, the president, and the courts. To preserve states' rights, it also divided power between the federal government and the states. To preserve individual freedoms, it placed certain limitations on the states and on the federal government.

The most famous of these limitations, of course, are found in the Bill of Rights, but the Constitution itself prohibits the exercise of certain kinds of governmental powers. For example, the Constitution prohibits bills of attainder (a legislative act singling out a particular person, pronouncing him guilty of a crime without trial or conviction according to established rules of procedure) and state laws which impair the obligation of contracts. This Contract Clause (Article I, section 10) provides a good means of showing students how the Constitution applies not just to ordinary people, but to mighty sovereigns as well.

Case Study: The Dartmouth College Case

This case is a useful way to reinforce concepts of constitutionalism because it pits a sovereign state against trustees of a small private institution. The fragility and vulnerability of the college in this contest were emo-

tionally stated by Daniel Webster in one of the most famous oral arguments in Supreme Court history: "It is. . .a small college—and yet there are those who love it."

In 1769, Dartmouth College was chartered by the English king. By this charter, the college was established as a private institution, its governance was spelled out and certain property was conveyed to it by private donors. Later, in 1816, the state legislature of New Hampshire passed a law completely reorganizing the governance of the college, making it a public institution, and changing the name to Dartmouth University. The old trustees of the college sued, alleging that the state had gone beyond its constitutional powers. Citing the Contract Clause of the Constitution ("No state shall. . .pass any. . .law impairing the obligation of contracts."), they said the state action impaired their original charter (contract) and should be struck down, in effect upholding the original charter.

Did the new charter impair the old, in contravention of the U.S. Constitution? The U.S. Supreme Court said it did. The Court held that the state act of 1816, which made the college public and increased the number of trustees, impaired the operation of the college as an institution intended by the founders. Indeed, under the act of 1816, the charter which was originally intended no longer existed. Thus, the New Hampshire legislature violated the Constitution of the United States, and the act of 1816 was unconstitutional and void.

In *Dartmouth College v. Woodward* [4 Wheaton (17 U. S.) 518 (1819)], the Court's language shows how the issues of property and power affected the decision. "From the review of this charter. . .it appears that the whole power of governing the college. . .was vested in the trustees." But the state of New Hampshire also has power to regulate life in the state and enact laws for the common good. Noting the existence of the two powers, the Court reasoned that the power of the state would have prevailed in any conflict between the trustees and the state, *except for the constitutional prohibition of impairment of contract*. "A repeal of this charter, at any time prior to the adoption of the present Constitution of the United States, would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature, to be found in the constitution of the state. But the Constitution of the United States has imposed this additional limitation, that the legislature of the state shall pass no act 'impairing the obligation of contracts.' "

Thanks to this constitutional provision, "The acts of the legislature of New Hampshire. . .are repugnant to the Constitution of the United States," and so the state of New Hampshire—a sovereign state immeasurably richer and more powerful than the trustees of a tiny college—will have to cease its efforts to take over the college.

In his book, *The Constitution and Chief Justice Marshall* (New York: Dodd, Mead & Company, 1978), historian William F. Swindler devotes a chapter of analysis to the Dartmouth College case, in addition to reprinting the full text of the Court's decision and a number of relevant documents. Swindler begins his discussion of the case by quoting a later Supreme Court justice, Oliver Wendell Holmes, who in 1913 said, "I do not think the United States would come to an end if we lost our power to declare an act of Congress void," [but] "I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states."

Swindler writes, "it was in this area—the definition of federal supremacy through judicial review—that the Marshall Court was to express its most pervasive and forceful construction of constitutional powers. The Judiciary Act of 1789 had provided specifically for judicial review of state actions which were charged with being in conflict with the paramount national law. . .but Marshall's concern was that the Supreme Court's right of review in these cases should be based on constitutional mandate rather than depending upon legislation subject to amendment by changing majorities in Congress."

Marshall found such constitutional mandates, Swindler points out, in several clauses, including Article VI, clause 2, the Supremacy Clause, and Article I, section 8, clause 18, the Necessary and Proper Clause, which underlay the Court's reasoning in the McCulloch case.

In 1819, the same year *McCulloch* was decided, Marshall used the Contract Clause in the Dartmouth College case, Swindler writes, "as the practical implement for asserting judicial surveillance of state actions. The major and continuing constitutional principle to emerge from the Dartmouth College case—taken with the sweeping opinion in [*McCulloch*] in this same term—was the paramountcy of the federal Constitution. . .in a state-federal relationship."

Questions/Strategies

Discuss with students:

1. What did the state legislature try to do in this case?
2. Why were its efforts unsuccessful?
3. What constitutional provision gave the federal government the power to limit a state decision?
4. Did this decision of the U.S. Supreme Court protect private property? If so, how?

5. How does this case illustrate the quotation from de Tocqueville beginning the chapter?
6. Ask students to provide other examples of suits by citizens against the government. Does the government always prevail in these disputes? Should it?

LESSON HIGHLIGHT

Ask students to discuss the concept of power. The word often means "mighty, with great strength." A large army is powerful; a heavyweight boxer is powerful; a huge machine is powerful.

However, "power" is not always the same thing as physical force. It can be defined as the ability to produce an effect on people and events. In this sense, "power" can also come from words and symbols. It can come from the authority to direct activity. Discuss concepts of power with students, and ask them to consider the power of words and symbols by rank ordering the following: the flag; a law prohibiting horses and buggies on downtown streets; the federal budget; a speech in Congress on an important bill; a presidential address to the people; an executive order eliminating discrimination in federal agencies; a nuclear arms treaty; the Constitution.

Ask students where the power of the Constitution comes from. Possible answers include:

- The police and/or the armed forces. (Sometimes "power" and "might" are not so far apart. There have been a few times in our history—the Civil War is the best example—when an appeal to might was necessary to decide between two very different ideas about the Constitution.)
- The president, members of Congress, and other government officials. (Elected officials take an oath to "support and defend the Constitution of the United States of America." They, too, have an important role in preserving and protecting the Constitution.)
- The people. (Without their support, the Constitution might be just another scrap of paper. Share with students the following quotation from de Tocqueville: Without the justices of the Supreme Court "the Constitution would be a dead letter; the executive appeals to them for assistance against the encroachments of the legislative power; the legislature demands their protection against the assaults of the executive; they defend the Union from the disobedience of the states, the states from the exaggerated claims of the Union, the public interest against private interests, and the conservative spirit of stability against the fickleness of democracy. Their power is enormous, but it is the power of public opinion. They are all-powerful as long as the people respect the law; they would be impotent against popular neglect or contempt of the law.")

TOPIC

5

Civil Rights Issues Confront the Court

We hold these truths to be self evident: That all men are created equal....

—*Declaration of Independence*

Objectives

1. To explore the concept of equality in American history.
2. To review other challenges facing the Court from the death of John Marshall to the turn of the century.

Reading Assignment

Equal Justice Under Law, pp. 40—60.

This section of *Equal Justice Under Law* covers a wealth of material in few pages. The years treated, roughly 1835 to 1900, saw rapid change within the social, technological and economic fabric of American life. To move class discussion from the wide variety of topics found here to a more in-depth understanding of one particular issue, this topic will focus on the concept of civil rights/equality as embodied in decisions before the Court. Other themes for class discussion include economic issues, property rights, and war powers.

Background

The cases included here are adapted from summaries appearing in Claude L. Heathcock's *The United States Constitution in Perspective* (Boston: Allyn & Bacon, Inc., 1972).

Although not explicitly mentioned in the Constitution, slaves had existed in America for more than a century. During the Constitutional Convention, men like Gouverneur Morris and Benjamin Franklin argued to abolish slavery, saying that it was incompatible with the principles the new nation was founded upon. But even though many members of the convention could not justify slavery intellectually, they did not necessarily see the races as equal. This predisposition, and the desire to protect the sanctity of property, led the convention to make the "three-fifths" compromise. [Article I, section 2, clause 3: "Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons...."]

The compromise settled the dispute between northern and southern states over the representation and taxation to be accorded to black slaves, *i.e.*, "all other persons."

The abolitionist movement was most active from the early 1800s until the Civil War. *Equal Justice Under Law* briefly mentions this grass-roots campaign. In response to the abolitionists' moral arguments against slavery, advocates of slavery argued the states' rights and states' authority to protect the property rights of their citizens. Though decisions of the Marshall Court had helped strengthen the federal government (see topics 3 and 4), a tension still existed between those who wanted a strong central government and those who feared one.

In discussing *Dred Scott v. Sandford* [60 U. S. 393 (1857)], Claude Heathcock's *The United States Constitution in Perspective* notes that legislative compromises had failed to resolve the slavery issue, making it inevitable that the controversy would reach the courts. Heathcock summarizes the facts of *Dred Scott* as follows: "As the property of John Emerson (an army surgeon), Dred Scott had resided for a considerable time in the free state of Illinois, where slavery was prohibited.... Emerson sold Scott to John Sanford (misspelled as 'Sandford' in the official Supreme Court records), a Missouri resident. Scott sued for his freedom in the Missouri courts, claiming he was a free citizen because of his stay in free territory (Illinois)."

Heathcock writes: "There were three basic issues in *Dred Scott v. Sandford* that were highly controversial and politically explosive: (1) *The question of jurisdiction*.... Was Dred Scott a citizen of the United States and thus entitled to sue in federal courts? (2) *The question of congressional action.* Did Congress have the right to exclude slavery from the territories? If not, what was the constitutional status of the Missouri Compromise [of 1820]? (3) *The question of the protection of property.* If the slave was property, was the Fifth Amendment [which says that no person can be deprived of property without due process of law] violated by declaring a slave a free man by virtue of the fact that he traveled to a free State or territory, thus depriving an owner of his property without compensation?"

In answer to question one, the Court, by a vote of 6 to 3, ruled that Dred Scott was not a citizen and therefore not entitled to sue in federal courts. Chief Justice Taney ruled that Negro slaves were not intended by the Framers of the Constitution to be included in the term "sovereign people." He wrote:

> A state may certainly confer citizenship on a person, but that State citizenship does not entitle him to be a citizen of the United States or any other State for that matter.

In answering the second question, the majority concluded:

> ...If the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal...has a right to draw such a distinction or deny to it the benefit of the provisions...for the protection of private property against the encoachments of the government.... It is the opinion of this Court that the act of Congress which prohibited a citizen from holding or owning property of this kind in the territory of the United States north of the line therein mentioned [the reference is to the Missouri Compromise] is not warranted by the Constitution, and is therefore void.

In answering the third question, Chief Justice Taney wrote:

> That neither Dred Scott, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.

"Most historians and constitutional law authorities," Heathcock concludes, "hold that the issues of *Dred Scott* were decided more upon political beliefs than upon sound judicial reasoning."

The Civil War erupted four years after the Dred Scott decision. After the war, Congress passed the Thirteenth Amendment (1865), outlawing slavery; the Fourteenth Amendment (1868), guaranteeing "due process" to all citizens of every state; and the Fifteenth Amendment (1870), guaranteeing the right of citizens to vote irrespective "of race, color, or previous condition of servitude."

It fell to the Court to interpret these amendments and such laws as the Civil Rights Act of 1875.

Heathcock writes, "The Civil Rights Act made it a crime for any person to deny to another person the right to a full and equal treatment regarding public conveyances and public places, such as restaurants, theaters, and inns.

"When the *Civil Rights Cases* [109 U.S. 3 (1883)] came before the Supreme Court, the Court (in adhering to the constitutional theory of that time) held the Civil Rights Act unconstitutional. Associate Justice Bradley's opinion held that the explicit language of the Fourteenth Amendment states that no State shall deny due process of law or equal protection of the law, and that 'no State' could not be construed to mean 'no person.' In addition, the Court held Congress, in passing legislation to enforce the Fourteenth Amendment, may not make private discrimination a crime when the Amendment does not forbid private discrimination. It declared that in the

case of private discrimination the citizen must look to the States for protection, not to the national government."

Bradley's opinion also held that the freed black slaves should no longer be accorded special treatment under the law:

> ...there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.

Associate Justice John Marshall Harlan answered this claim in the sole dissenting opinion.

> It is...scarcely just to say that the colored race has been the special favorite of the laws. What the nation, through Congress, has sought to accomplish in reference to that race is what had already been done in every state in the Union for the white race, to secure and protect rights belonging to them as freemen and citizens; nothing more.

Harlan reasoned that common carriers and operators of public places are not private persons, that they carry on businesses under state authority subject to public controls, and in this sense are agents of the state. (Many decades later, Heathcock notes, the Court accepted this line of reasoning in cases involving racial discrimination).

Heathcock writes that the years following Reconstruction produced many laws in the southern states designed to segregate the races. "The basic formula centered around 'separate but equal' facilities in all areas of contact between the races. Separate schools, parks, waiting rooms, restaurants, and bus and train accommodations were maintained. Rigid laws were passed to force compliance."

Plessy v. Ferguson [163 U. S. 537 (1896)] stemmed from a Louisiana law which provided that all railway companies would provide equal but separate accommodations for the two races. Plessy, seven-eighths white and one-eighth black, was arrested for going "into a coach or compartment to which by race he does not belong" when he tried to board a Louisiana railway car reserved for whites. Plessy argued that his arrest was unconstitutional. The Court did not agree. Associate Justice Henry Billings Brown delivered the majority opinion:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.... The argument also assumes that social prejudice may be overcor by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition.

Justice Harlan again was the lone dissenter.

> Our constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.
>
> It is...to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race. In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case.... State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned.

The "separate but equal" doctrine established in *Plessy v. Ferguson* dominated the civil rights scene well into the twentieth century. Along with Court decisions limiting federal protection of voting rights, such as *United States v. Cruikshank*, [92 U.S. 592 (1875)], it left the states considerable latitude in their treatment of blacks. Poll taxes and "grandfather clauses"—laws requiring that voters' grandfathers had to have been registered voters by 1867, when black suffrage had only been institutionalized by the Fifteenth Amendment in 1870—effectively limited black political activity, and much of the social and political change of Reconstruction was undone.

Questions/Strategies

1. The Court's divided decision in *Dred Scott*—six justices wrote separate concurring opinions, two dissented—reflected the division within the country. Point out to the class how the Court's composition may have had some effect on its decision. As noted earlier, the Supreme Court of John Marshall's day did much to establish itself as the final arbiter of constitutional disputes and to underline federal supremacy. In 1835, President Andrew Jackson appointed Roger Taney as chief justice, a man who "interpreted . . . state powers more generously than Marshall had." (*Equal Justice Under Law,* p. 42) The Dred Scott case was decided during Taney's tenure. Would the decision have been any different had Marshall and his associates still been on the bench?
2. The caption on page 43 of *Equal Justice* refers to an editorial in a northern newspaper which said: "If the people obey this decision, they disobey God." What is meant by this statement? Explore with the class the various options available to those who did disagree with the decision. Given the tenor of the times, how much effect did the *Dred Scott* decision have on the course of events which followed? Have students point out passages in *Equal Justice* which suggest an answer to this question. Would the events that followed the case have been different if the Court had ruled in Dred Scott's favor?
3. Compare the rulings of the Court during this period with its rulings in *Brown v. Board of Education* and subsequent cases (see topic 10). Select quotes from the rulings of each period and have students identify the historical period in which they appeared. Why did it take almost 60 years for the Court to overrule its decision in *Plessy*?
4. To help students explore the range of issues presented in pages 40–60 of *Equal Justice,* use the time line as presented in this topic and have the students formulate the rule of law in each of the cited cases. Ask them to discuss present day implications of the cases. The cases can be organized and treated under such headings as war powers and economic issues to facilitate discussion.

LESSON HIGHLIGHT

Have students read the newspaper article about Dred Scott which appears on page 45 of *Equal Justice.* What does the article highlight and why? Ask students to imagine what a newspaper today would report on Dred Scott and the Court's decision. What differences would there be in the coverage? Have students write an article on Dred Scott as they think it would appear in their local paper. Use this opportunity to explore media coverage of important cases and its impact on public opinion.

The Court Continues to Grow in Power

CASE		RULE OF LAW
Charles River Bridge v. Warren Bridge (p. 38)	1837	
Dred Scott v. Sandford (pp. 42-43)	1857	Negroes were not citizens of the United States. (The second time the Court declared an act of Congress—the Missouri Compromise in this instance—unconstitutional)
Prize Cases (pp. 49-50)	1862	
Ex Parte Milligan (pp. 50-51) (include *Merryman*)	1866	
Legal Tender Cases (pp. 55-56)	1874	
Munn v. Illinois (pp. 57-58)	1877	Businesses "affected with a public interest"—public utilities—can be regulated by the state and/or federal government.
Civil Rights Cases (pp. 59-60)	1883	
Income Tax Case (pp. 58-59)	1895	
Plessy v. Ferguson (p. 60)	1896	

TOPIC

6

The Supreme Court Confronts Antitrust Issues: 1890–1910

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.
>
> —Sherman Antitrust Act

Objectives

1. To observe how the justices grappled with antitrust issues at the turn of the century.
2. To develop further an understanding of judicial decision-making—in particular the interplay of the judges' own beliefs and the dictates of the Constitution.

Reading Assignment

Equal Justice Under Law, pp. 56–62.

Once again, these pages are filled with important events in our history. As in the previous topic, the steady flow of events and cases call for imaginative planning and supplementary information not included in *Equal Justice.* Instructors will have to focus on the subject matter that is most relevant to the curriculum and comprehensible to the students. Cartoons, illustrations, pictures, and biographical references to great jurists included here may also help illuminate a turbulent period in our history.

Background

One of the most prominent and important areas covered is that of antitrust. Leonard F. James' *The Supreme Court in American Life* (Glenview, IL: Scott, Foresman and Co., 1971), briefly describes the debate over governmental regulation of the economy:

> After the Civil War, the American economy underwent rapid expansion. Older industries, such as coal mining, grew and prospered. New ones, like steel manufacture, developed into giant enterprises. A railroad network criss-crossed the nation. Thousands of immigrants settled in fast-growing cities.
>
> Such expansion was not achieved without conflict. Operating in an atmosphere of keen and unrestricted competition, many men who controlled American industry were far more interested in quick profits than in the general welfare. They formed monopolies to squeeze out small businessmen, and agreed among themselves to fix prices at high levels.

By the late nineteenth century, the questions of monopoly and virtually unrestricted free enterprise were becoming of increasing concern to Americans. Supporters of a laissez-faire policy believed that the nation would prosper best if business were let alone. Opponents argued that unregulated free enterprise was hurting the nation; that monopolies were killing competition; and that the average American was forced to pay whatever the monopoly charged or go without. They demanded government regulation to correct these abuses....

[Questions of federal regulation inevitably came before the courts.] The answers hinged largely on the Commerce Clause in Article I, section 8 of the Constitution. The Court decision in *Gibbons v. Ogden* [see *Equal Justice,* pp. 36, 39-40] served as a useful precedent before this period, but times had changed since 1824. At that time, and for decades afterward, "commerce" was considered to mean chiefly transportation—the movement of goods. As time went on, however, men debated whether the broad field of commerce also involved manufacturing—the production of goods.

In 1890 Congress passed the Sherman Antitrust Act, which prohibited contracts, combinations, and conspiracies in restraint of interstate and foreign trade, as well as monopolies on trade or commerce. In interpreting this law, the key question became: "What is commerce, and to what extent can it lawfully be regulated by the United States?" The Court's wrestling with this law as it applies to American industry provides an instructive study in its attempt to interpret legislation, as well as in the importance of the justices' personal philosophies as they address the perennially difficult issues of property and power.

The sugar trust case, *United States v. E. C. Knight Co.,* [156 U. S. 1 (1895)]—see page 58 of *Equal Justice*—was the first antitrust suit addressed by the Court. Even though the American Sugar Refining Company controlled virtually all the sugar refined in the U.S., the Court declined to enforce the Sherman Act against the company, on the grounds that the monopoly primarily affected manufacture and not commerce.

The majority wrote:

> ...that which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the individual States.... Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce *follows* manufacture, and is not a part of it. The power to regulate commerce...is a power independent of the power to suppress monopoly....

Justice Harlan was the only dissenter in this case. He said that if this monopoly "cannot be restrained... under some power granted to Congress, it will be cause for regret that the patriotic statesmen who framed the Constitution did not foresee the necessity of investing the national government with power to deal with gigantic monopolies...."

Noting the liberality with which Chief Justice John Marshall interpreted the Constitution, Justice Harlan quoted from one of his decisions: "[If a narrow construction] would cripple the government, and render it unequal to the objects for which it is declared to be instituted...then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded."

In *Themes in United States History* (New York: Glencoe Press, 1973), James F. Wickens points out that "the Sherman Antitrust Act itself proved ineffective during its early years. In the first decade of its existence, in fact, the federal government achieved only five indictments out of eighteen suits, four of which were against labor unions. Traditionally, judges have received the blame for this ineffective regulation, by caterng to outdated concepts of unrestricted free enterprise.... But, much of the blame rested with elected leaders as well."

> That the Sherman Act in its early years languished...is directly the fault of...the three Presidents [Benjamin Harrison, Grover Cleveland, and William McKinley] preceding Theodore Roosevelt.... [They] simply were not interested in making the law effective. (Russel B. Nye, *American Historical Review* 61 (1956), p. 426)

"In contrast," Wickens points out, "during the administrations of the next three presidents, federal antitrust suits numbered over two hundred, with about fifty percent indictments."

Supreme Court antitrust decisions following the sugar trust case also breathed new life into the Sherman Act. In *Addyston Pipe and Steel v. United States* [175 U.S. 211 (1899)]—a case which *Equal Justice* describes as ushering in "a dramatic decade of 'trust-busting' " (see page 60)—the Supreme Court was careful to distinguish the facts from the facts in the sugar trust case. If the sugar case involved only manufacture (with commerce as a subsequent and incidental product), then the Commerce Clause of the Constitution did not apply and the industry could not be regulated. But *Addyston* involved contracts on interstate sales "as a

direct and immediate result of the combination [trust].... But for the restriction, the resulting high prices for the pipe would not have been obtained. It is useless for the defendants to say they did not intend to regulate or affect interstate commerce."

In *United States v. Northern Securities Co.* [193 U.S. 197 (1904)] – see pages 60-62 of *Equal Justice* – the government challenged an attempt to control railroad transportation in the northwest. As in the prior cases, the decision hinged on the definition of interstate commerce. This time, Justice Harlan, the only dissenter in the sugar trust case, wrote the decision for the narrow 5-4 majority. His decision here demonstrates the expansive or liberal reading of the law and the Constitution that he had advocated in dissent in the sugar trust case. As Bartholomew and Menez point out in *Summaries of Leading Supreme Court Cases on the Constitution,* Harlan reasoned that this combination of railroads was a "trust" within the meaning of the act. Even if not, it was a combination in restraint of interstate commerce, and that was enough to bring it under the act. The mere existence of the combination constituted a menace to, and a restraint upon, that freedom of commerce which Congress intended to protect – and which the public was entitled to have protected. As to the argument that the combination was protected by the laws of New Jersey, Harlan reasoned that even if the stockholders of the two railroad companies could consolidate under state law, it did not follow that the companies could lawfully combine to destroy competition and restrain trade.

In dissenting, Justice Holmes created the memorable phrase, "Great cases, like hard cases, make bad law." President Theodore Roosevelt, who had appointed Justice Holmes as a liberal only to see him vote as a conservative, stormed, "I could carve out of a banana a judge with more backbone than that."

Standard Oil Co. of New Jersey v. United States [221 U.S. 1 (1910)] – see pages 61-62 of *Equal Justice* – capped the government's antitrust efforts during this period. In this case, Chief Justice White reasoned that Standard Oil was a combination that would result in the control of interstate and foreign commerce. However, the Court proceeded to read meaning into the act not found there directly. It held that the Sherman Act should not apply to *every* contract or combination in restraint of trade, but only to those that do so unreasonably. White noted that the previous history of the law of restraint of trade dealt with *undue* restraint of trade, which over time became synonymous with the words "restraint of trade." It thus becomes obvious "that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations... have been committed is the rule of reason guided by the established law..." As *Equal Justice* points out, this "rule of reason," though used to uphold a conviction in this particular case, changed the interpretation of the law.

Questions/Strategies

1. Discuss these four antitrust cases, all dealing with the same act and all decided within two decades. Ask students to find the rule of law established in each case, and to compare/contrast the Court's reasoning. [Manufacture is not necessarily commerce (the sugar trust case); combinations that directly affect interstate commerce can be regulated (*Addyston*); certain kinds of combinations, by their very nature, constitute an illegal restraint of trade (*Northern Securities*); mere monopoly is not enough to run afoul of the Sherman Act, since the combination must not only restrain trade but must do so "unduly" or "unreasonably" (*Standard Oil*).] Refer to the cartoons and illustrations on pp. 66-69 and incorporate them into the discussion.
2. What explanation can you offer for these changes in the thinking of a majority of the justices? Does the time period in which a case is decided affect the thinking of the justices? Should it?
3. Ask students to discuss the difference between strict construction of an act of the Constitution and liberal or expansive construction. Point out that the two schools of thought have existed from the nation's beginning. Go back to some of the Marshall cases to see his defense of a liberal reading of the Constitution. Point out that "liberal" in this sense doesn't necessarily mean politically liberal. The word, as applied to judicial reasoning, suggests a willingness to infer something in an act or the Constitution that is not there explicitly. Ask students if this kind of thinking distorts the Constitution or a statute, or if it is necessary to keep these documents abreast of changes in society.
4. Both the Commerce Clause and the Contract Clause, which was central to in the Dartmouth College case discussed in topic 4, deal with the question of federal jurisdiction. How are these related to or different from the Supremacy and Necessary and Proper Clauses? You might wish to jump ahead at this point to consider the much more extensive use of the Commerce Clause in the 1930s which is covered under Topic 8.

5. The Dartmouth College case, *McCulloch v. Maryland,* and many of the cases discussed in *Equal Justice,* such as the Greenback and Granger cases (see pp. 55-58), deal with property. Ask students to study these cases together to determine major trends in legislation regarding property, Supreme Court decisions on property, and the issues of federalism which they involve.

LESSON HIGHLIGHT

The antitrust issues covered under this topic pose difficult and complex problems of understanding for many students. In order to facilitate examination of this important topic while building student knowledge and skills, have each student or teams of students conduct research on the following topics and report back to the class on their findings:

- The financial dealings of J. P. Morgan, James J. Hill, E. H. Harriman, and other barons of industry at the turn of the century.
- Recent federal antitrust legislation and the major changes such legislation has undergone since the early 1900s.
- The present day "multinational corporation" and efforts to control and/or regulate its operation in the international arena.

TOPIC

7

The Supreme Court and Civil Liberties: 1920–1932

> The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.
>
> – Justice Oliver Wendell Holmes

Objectives

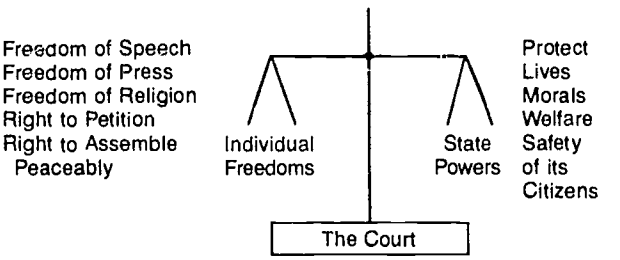
1. To introduce the idea of liberty.
2. To explore the conflict between individual rights and state powers and see how the Court has grappled with these issues.

Reading Assignment

Equal Justice Under Law, pp. 67-80.

"Civil liberties" is the term usually applied to the rights stated in the Bill of Rights – the first ten amendments to the Constitution. At times, these rights come into conflict with the state's police power – the power to protect the lives, health, safety, morals, and welfare of the people.

First Amendment issues can be diagrammed as follows:



Background

Four important First Amendment cases are summarized briefly on pp. 67–71. They are:

- *Schenck v. United States* (1919)
- *Abrams v. United States* (1919) – (*Abrams* is not mentioned by name, but it is referred to in the second column on p. 67, when the authors discuss the Holmes and Brandeis dissents in the case.)
- *Gitlow v. New York* (1925)
- *Near v. Minnesota* (1931)

These cases are landmarks in the Court's review of First Amendment issues. Below are key quotations from each of the cases. These are drawn from the book *Freedom of Speech,* edited by Franklyn Haiman (Skokie, IL: National Publishing Company, 1983), a sourcebook containing excerpts from important decisions in this area, as well as useful commentary.

Haiman writes that it is primarily since 1917 that the U.S. Supreme Court has been writing opinions which give us guidance in interpreting the Free Speech Clause of the First Amendment. Congress passed no laws governing political speech between the expiration of the Alien and Sedition Act in 1801 and America's entry into World War I, but "the stresses of domestic opposition to World War I and the influences of the Bolshevik revolution in Russia caused Congress to embark on a series of measures to restrict antigovernment talk. The Espionage Act of 1917 made it illegal to attempt to cause insubordination among the military services or to obstruct the draft. In 1918, this act was amended to include...statements which were designed to interfere with the sale of U.S. bonds or which included any 'disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution.'...These laws, plus similar legislation on the state level such as the New York Criminal Anarchy Act...have been the source of many arrests and trials during this century in the United States."

The first landmark decision of the U. S. Supreme Court in the field of political heresy was written in 1919. It dealt with a leader of the Socialist party who had been convicted of violating the Espionage Act for sending leaflets to prospective draftees urging them to resist the Conscription Act.

In *Schenck v. United States* [249 U.S. 47 (1919)], the Court affirmed his conviction. Justice Holmes spoke for the majority:

> ...The document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out....
>
> We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstance in which it is done....
>
> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic....
>
> When a nation is at war many things that might be said in times of peace are of such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any Constitutional right.

Later that year, the Court considered a case arising under the 1918 amendments to the Espionage Act. At issue was a conviction for publication of a left-wing pamphlet that protested the dispatch of United States troops to Russia. In *Abrams v. United States* [250 U.S. 616 (1919)], Justice Clarke's majority opinion affirmed the conviction:

> ...It will not do to say...that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved...defeat of the war program of the United States, for the obvious effect of this appeal...would be to persuade persons...not to aid government loans and not to work in ammunition factories....

Justice Holmes' dissent, which disagreed with the majority's view of what constituted a clear and present danger, is often quoted:

> It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion.... An intent to prevent interference with revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged....

Holmes went on to note that a twenty-year prison sentence was imposed for publishing the two leaflets, and suggested that the defendants were being "made to suffer not for what the indictment alleges, but for the creed that they espouse...." Holmes also cited American history:

> I wholly disagree with the argument of the government that the First Amendment left the common law as to seditious libel in force. History seems to be against the notion. I had conceived that the United States through many years had shown its repentence for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of civil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law...abridging the freedom of speech.'

In *Gitlow v. New York* [268 U.S. 252 (1925)], the Court affirmed another conviction for publishing a left-wing pamphlet, but this time it was a state law that was violated. Justice Sanford's opinion for the majority said this case was properly before the Supreme Court because the liberty protected by the Fourteenth Amendment includes the liberty of speech and press. Thus, states have the same prohibition against abridgment of speech and press as was imposed on the federal government by the First Amendment. However, in this case he found the state statute constitutional.

> The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the formal government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. There words imply urging to action....
>
> That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear. Such utterances, by their very nature, involve dangers to public peace and to the security of the state.. and the immediate danger is nonetheless real and substantial because the effect of a given utterance cannot be accurately foreseen.... A single revolution's spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration....

Justice Holmes wrote a dissent in which Justice Brandeis joined. Holmes noted that the clear and present danger test had been departed from in *Abrams v. United States* and urged that it be reinstated in this case.

> If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It was said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief, and if believed, it is acted upon....
>
> Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in proletariat dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

In *Near v. Minnesota* [283 U.S. 697 (1931)], Chief Justice Hughes' majority opinion struck down a Minnesota law that permitted prior restraint on the press. (See *Equal Justice,* pp. 69 and 71, for a discussion of the facts of the case):

> ...the authority of the state to enact laws which promote the health, safety, welfare and morals of its people is necessarily admitted.
>
> [But] the fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege....

Questions/Strategies

1. Select quotes from the cases noted above and distribute them to students without identifying their authors or the cases in which they appear. Have students indicate whether they agree or disagree with each of the quotes and why. Then, using the diagram on First Amendment issues included in this topic, discuss the facts, issues, opposing arguments, decisions and opinions in each case. After this discussion, ask students whether their initial reactions to the quotes remain the same.
2. In the unanimous *Schenck* decision, Justice Holmes developed the now oft-quoted "clear and present danger" rule, used as the opening quotation of this topic. Class discussion and application of this rule will illustrate the difficulty of applying legal principles to specific cases. Ask students whether they think the freedom of speech guarantee protects the persons in the following situations. Also ask what additional information and circumstances might sway their decision one way or another. In this context, it might be useful to suggest such considerations as the time, place and manner of the speech, and any laws or regulations which might be involved (e.g., unlawful assembly ordinances, park permits, and school codes).
   - A person is speaking on a street corner charging local politicians with corruption.
   - A person pickets in front of a store charging the owners with consumer fraud.
   - A student distributes pamphlets in school to protest alleged discrimination against minority students.

- A group of demonstrators assemble in a park to protest American military involvement in foreign conflicts.

3. The famous dissent of Justice Holmes in *Abrams* also included the following statement:

> But when men have realized that time has upset many fighting faiths, they may come to believe that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

What does Holmes mean by "time has upset many fighting faiths," "free trade in ideas," and "competition of the market"? What establishes something as "truth"? How is "all life...an experiment"?

4. A crucial feature of *Schenck, Abrams,* and *Gitlow* is the question of "proximity," to use Justice Holmes' word. In this regard, a distinction is often made between advocacy of ideas and advocacy of action. Which type of advocacy seems most prominent in each of the cases?
5. The first two cases deal with a federal statute passed in wartime, and Justice Holmes' decision in *Schenck* expressly points out that words and actions which would be lawful in peacetime may be prohibited in times of war. Identify some other wartime measures which would not be permitted in peacetime. (The Alien and Sedition Act, passed during the undeclared war with France; martial law during the Civil War; relocation of the Japanese during World War II.)
6. Justice Holmes' dissent in *Gitlow* recalls the Sedition Act of 1798. Ask students to research that law, and compare it to the New York legislation under attack in *Gitlow.* How close did speech have to be to crime to warrant prosecution under the Sedition Act? Under the New York law? Under the clear and present danger rule?
7. The Bill of Rights was ratified in 1791, yet there are no Supreme Court cases involving freedom of speech until *Schenck* in 1919, and scores of such cases in the years since. Why is this? (Hint: Consider that the Court held in *Gitlow* that the First Amendment applies to state as well as federal laws.)
8. *Near v. Minnesota* deals with a statute that permitted "previous" or "prior" restraint. What is "prior restraint," and how have courts generally responded to it? What other remedies might be found besides forbidding publication? Ask students to compare and contrast *Near* with the *New York Times* case of the 1970s (see topic 12).
9. These pages in *Equal Justice* often deal with the two great dissenters, Louis Brandeis and Oliver Wendell Holmes. Why were Justices Holmes and Brandeis called "The Great Dissenters"? What role do dissenters play in the history of the Court? Identify other dissenters whose opinions may have played an important role in the history of the Court. (See John Marshall Harlan's dissents in topics 5 and 6).
10. This section of *Equal Justice* also includes criticisms of the role of the Court. Examine the pages of this section and cull examples of such criticism. Do you agree with them? Support your position with evidence or examples. In what other periods did the Court engender strong criticism? What possible results can such criticism have?

LESSON HIGHLIGHT

The issue of libel which arose in *Near* has emerged recently in Ariel Sharon's suit against *Time* magazine and General William Westmoreland's suit against CBS. Through newspaper and magazine articles, have students research the facts and disposition of these cases. Invite a representative of the media and an attorney to class to discuss such libel issues. If a similar case has arisen in your community, use that case as the basis of the lesson.

TOPIC

8

The Supreme Court and the New Deal

> [I]t is perfectly clear that as Chief Justice Hughes has said, "We are under a Constitution, but the Constitution is what the judges say it is."
>
> We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself.
>
> —Franklin Delano Roosevelt, radio address in 1937

Objectives

1. To convey (through discussions, reports, and references to cartoons and illustrations) the New Deal response to the challenges of the Great Depression of 1929 and the Supreme Court response to the New Deal legislation.
2. To bring to life the constitutional crises of the New Deal's early days.
3. To continue the discussion of power under our Constitution, with particular reference to federalism and the role of the states.

Reading Assignment

Equal Justice Under Law,, pp. 80-83 and 88-95.

With the election of Franklin D. Roosevelt in 1932 during the Great Depression, the American people looked to Washington for leadership and they were not disappointed. The president and the Congress joined forces in enacting laws designed to improve business conditions, help the farmer, put men and women back to work, and provide assistance for the unemployed and the aged. It was a period in which frustrations with Supreme Court decisions mushroomed, culminating in FDR's proposal to increase the size of the Court. The "fight" that ensued is an instructive study of how the American people and some of their leaders responded to the constitutional crisis.

The sparse materials in the book necessitate additional resources. Several important case summaries are presented here. With assistance from school and community librarians, additional materials can be secured for more intensive study and for reports.

Background: Early New Deal

One of the issues facing the Court in these years was to what extent state regulation of the economy was constitutional. The Granger case of 1877, *Munn v. Illinois* [94 U.S. 113], had upheld the constitutionality of state regulation of grain warehousing because when private property affects the community, the public has constitutional power to protect its interest by law (see *Equal Justice*, pp 56-58). Later cases had provided more protection to private property without overruling *Munn* directly.

In *Nebbia v. New York* [291 U. S. 502 (1934)], the proprietor of a grocery store in Rochester, New York, was convicted of violating a minimum price order of the New York Milk Control Board. Nebbia appealed to the Supreme Court on grounds that the statute authorizing the order contravened the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment, but the Court disagreed on the grounds that the milk industry in New York had long been subject to regulation in the public interest and the Constitution does not secure to anyone the liberty to conduct business in such a fashion as to inflict injury upon the public.

In another key case, however, the Court struck down a state regulation governing minimum wages for women. (The case is briefly discussed in column one of page 82 of *Equal Justice*. The following summary, and all other full summaries in this topic, are drawn from *Summaries of Leading Cases of the Court,* edited by Bartholomew & Menez, 12th edition, Totowa, New Jersey: Rowman & Allanheld, 1983.)

In *Morehead v. New York ex rel. Tipaldo* [298 U.S. 587 (1936)], Tipaldo was sent to jail upon the charge that, as manager of a laundry, he paid some of the employees less than the minimum wages established by the state minimum wage law.

OPINION BY MR. JUSTICE BUTLER
(vote: 5-4)

Question—Can a state fix minimum wages for women?

Decision—No.

Reason—The act left employers and men employees free to agree upon wages, but deprived employers and adult women of the same freedom. Likewise, women were restrained by the minimum wage in competition with men and were arbitrarily deprived of employment and a fair chance to find work. State legislation fixing wages for women is repugnant to the Due Process Clause of the Fourteenth Amendment.

Note—*Morehead* was reversed by *West Coast Hotel Co. v. Parrish* (1937), a year later, when Justice Roberts switched positions, "the switch in time that saved nine," and took the starch out of President Roosevelt's "court packing" attempt to increase the number of justices to fifteen and appoint new judges who were more sympathetic to his policies.

Another series of decisions dealt with federal regulation, and raised once again issues of the Commerce Clause. In *A.L.A. Schechter Poultry Corp. v. United States* [295 U.S. 495 (1935)], the Schechter company was convicted of violating what was known as the "Live Poultry Code," established by executive order under the National Industrial Recovery Act (NRA).

The NRA provided for the setting up of codes that would establish certain standards that were to be upheld under force of civil and criminal action. If an industry did not set up its own code, it would be up to the president to impose a code upon it.

OPINION BY MR. CHIEF JUSTICE HUGHES
(No evidence from the report that the decision was not unanimous.)

Questions—1. Was the act an illegal delegation of legislative powers? 2. Was the poultry in this case considered within the domain of the interstate commerce power of Congress?

Decisions—1. Yes.
2. No.

Reasons—1. The act set no standard nor rules of conduct to be followed. It was too broad a declaration, leaving the president too much room for discretion. The law was an unconstitutional delegation of legislative power.

The Constitution provides that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives," and the Congress is authorized "to make all laws which shall be necessary and proper for carrying into execution" its general powers. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.

2. Although the poultry came from various states, when it arrived in New York it remained there and was processed. Congress could regulate it until it reached New York; after that it was intrastate commerce and as such it could not be controlled by Congress.

(This is the case referred to on the top of page 81 of *Equal Justice* that killed the NRA.)

Other attempts at federal regulation were struck down for violating other provisions of the Constitution. In *United States v. Butler* [297 U.S. 1 (1936)], a case referred to briefly and not by name on page 81 of *Equal Justice*, the Court struck down taxes on cotton mills designed to fund crop reduction benefits paid to cotton farmers, on the grounds that the act invaded the rights reserved to the states. It was a statutory plan to regulate and control agricultural production, the Court said, a matter beyond the power delegated to the federal government.

The tax was based on the General Welfare Clause of the Constitution, which is a limitation on the power to tax, not an enlargement of it.

In *Carter v. Carter Coal Co.* [298 U. S. 238 (1936)], a case discussed in the last paragraph of page 81 of *Equal Justice*, the Court struck down the Bituminous Coal Conservation Act of 1935, on the grounds that commerce is "intercourse for the purposes of trade." Plainly the mining of coal does not constitute such intercourse, since the employment of men, fixing their wages, their hours of labor, and working conditions are purely local affairs.

Questions/Strategies: Early New Deal

1. Interview family, friends, and neighbors who lived during the 1920s and 30s to discover how it felt during the Great Depression to be an unemployed worker, a farmer who could not sell his/her produce, a business owner on the verge of bankruptcy, an old man or woman without any source of income, or a student just graduated from high school. (Statistics on business and bank failures and on unemployment might underscore the widespread despair. It should also be pointed out that there were many men and women who were well-to-do during this period.)
2. Using the chart in this topic, have the students discuss the first five cases, summarized above.
3. Who were the so-called "Four Horsemen" (Sutherland, Butler, McReynolds, and Van Devanter)? Why were they given this name? Was it complimentary?
4. Charging that the Court was turning the nation back to the "horse and buggy age," on February 5, 1937, President Roosevelt submitted to the United States Senate his court reform plan designed to increase the number of justices on the Court. Describe the plan. Who were the opponents to the plan? Why did opponents refer to it as "court-packing?"
5. Conduct an informal or prepared debate to highlight the position of the proponents and opponents. The cartoons in *Equal Justice* should enliven the proceedings. Each side in the debate, as well as other students, should be encouraged to draw their own cartoons reflecting developments during this period.

Background: Roosevelt's Second Term and the Court

As *Equal Justice* points out, a dramatic shift in the Supreme Court's analysis of regulatory issues took place following President Roosevelt's re-election. The case which upheld a state minimum wage law (referred to briefly on page 82 of *Equal Justice*) is *West Coast Hotel Co. v. Parrish* [300 U.S. 379 (1937)]. Washington state laws prohibited wages below a living wage and conditions of labor detrimental to the health and morals of women and minors. Such wages were established by the state's Industrial Welfare Commission composed of members of management, labor, and the government. Elsie Parrish brought suit to recover the difference between her wages and those established by the Industrial Welfare Commission over a period of years during which she was employed by the West Coast Hotel Company.

OPINION BY MR. CHIEF JUSTICE HUGHES
(vote: 5-4)

Question—Is the statute contrary to the Due Process Clause of the Fourteenth Amendment?

Decision—No.

Reason—The principle controlling the decision—the Fourteenth Amendment—was not in doubt. Those attacking minimum wage regulation alleged that they were being deprived of freedom of contract. "What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute, an uncontrollable liberty.... But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people.... Regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

The Court held that the state minimum wage was a valid exercise of state police power, and it was the conclusion of the Court that "the case of *Adkins v. Children's Hospital* [261 U.S. 525 (1923)] should be, and it is overruled." (This decision also had the effect of reversing *Morehead v. New York ex rel. Tipaldo.*)

As *Equal Justice* points out on pages 82–83, another decision that year dramaticially expanded the interpretation of "commerce" and the sphere of federal regulation. In *National Labor Relations Board v. Jones & Laughlin Steel Corp.* [301 U.S. 1 (1937)], the National

Supreme Court Rulings During the New Deal Period: 1934–1941

Case	Constitutional or Unconstitutional	Reason Given by Court	Significance
Nebbia v. New York (1934) See illustrations pp. 88–89	New York price-fixing milk law is unconstitutional	A state may regulate any business whatever when the public good requires it—5 to 4 ruling	(1) This ruling extended the public regulation principle from *Munn v. Illinois* and other Granger Cases (2) Although not a New Deal Case, it was thought that the reasoning of the Court might be followed in future cases.
Schechter Poultry Co. v. U.S. (1935) "Sick Chicken" Case See pp. 90–91			
U.S. v. Butler (1936) Agricultural Adjustment Act			
Carter v. Carter Coal Co. (1936) Coal Case			
Morehead v. New York (1936) New York Minimum Wage Law for Women			
On February 5, 1937, President Roosevelt sent his Court Reform Plan to the U.S. Senate			
West Coast Hotel v. Parrish (1937) Washington State Minimum Wage Law for Women			
National Labor Relations Board v. Jones & Laughlin Steel (1937) See p. 94			
U.S. v. Darby Lumber Co. (1941) See p. 83			

Labor Relations Board found that the Jones and Laughlin Steel Corporation had engaged in unfair labor practices under the National Labor Relations Act of 1935. The circuit court of appeals refused to enforce the order of the board, holding that the order lay beyond the range of federal power.

OPINION BY MR. CHIEF JUSTICE HUGHES
(vote: 5-4)

Question—Can Congress regulate labor relations under its interstate commerce power?

Decision—Yes.

Reason—"The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for its protection or advancement . . .; to adopt measures 'to promote its growth and insure its safety' . . . 'to foster, protect, control and restrain.' . . .That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it' . . . Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. . . . The fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce."

Note—*Jones and Laughlin Steel* pointed to a shift to a more governmentally regulated industrial economy. The underpinnings of *Carter v. Carter Coal Co.* [298 U.S. 238 (1936)] were reversed.

United States v. F. W. Darby Lumber Co. [312 U.S. 100 (1941)] underscored *Jones and Laughlin*. Darby was charged with employing workers at less than the prescribed minimum wage. He argued that the federal minimum wage law was unauthorized by the Commerce Clause and was prohibited by the Fifth Amendment.

The Court held unanimously that the purpose of the act was to protect interstate commerce from goods produced under substandard conditions. This was a matter of legislative judgment perfectly within the bounds of congressional power, and over which the courts are given no control.

Questions/Strategies: Roosevelt's Second Term and the Court

1. Incorporate the remaining three cases on to the chart. What conclusion can you draw from the completed chart? What part did the new appointments to the Court between 1937 and 1941 play in the "Constitutional Revolution?" It was said at the time that "a switch in time saved nine." What does this mean?
2. The American humorist, Finley Peter Dunne, had "Mr. Dooley" speak for him in his books. In referring to the Supreme Court, Mr. Dooley remarked: "No matter whether th' constitution follows the flag or not, th' Supreme Court follows th' illiction returns." What did he mean? Do the justices follow the election returns? Should they? (In referring to this exciting period, writers have made the following observations: between January, 1933, and May, 1936, twelve acts of Congress were declared unconstitutional; between January, 1935, and May 1, 1936, the Court upheld only two New Deal laws—The Tennessee Valley Authority Act and the "Gold Clause" law—while invalidating eight acts; between March, 1937, and June, 1941, not a single law of Congress was nullified.)
3. Why did the President's court reform plan fail? (There are several explanations: opposition from many sources—Congress, the legal profession, the press, and public opinion—the president's intransigence and questionable tactics, opposition by members of the president's own party in Congress, and perhaps the historic image of the Supreme Court as the umpire of the American system of government. Umpires make mistakes, but the American umpire has been able to change its mind and it may be this very fact that has won for it the confidence of the American people.)

LESSON HIGHLIGHT

Distribute copies of the "Song of the Supreme Court," which appears in this topic. Ask students the following questions:

1. What attitude does this poem express towards the Supreme Court? Is the author respectful of the Court? Satirical towards it?
2. Does the poem paint the members of the Court as politicians? As above politics? If so, does it consider this attitude a good thing?
3. Members of the Court who frustrated early New Deal legislation were often called "strict constructionists," because they insisted that the Constitution be interpreted strictly: unless explicit sanction in the Constitution could be found for an act it must be struck down. What attitude does this poem express toward this view?
4. Compare John Marshall's attitude toward interpeting the Constitution (see topics 3, 4, and 6) to that attributed to the New Deal Court in this poem.
5. Have students prepare their own verse to the song which indicates their view of the Court.

SONG OF THE SUPREME COURT

We're nine judicial gentlemen who shun the common herd,
Nine official mental men who speak the final word.
We do not issue postage stamps or face the microphones,
Or osculate with infants, or preside at corner-stones.
But we're the court of last resort in litigation legal.
(see: Case of Brooklyn Chicken versus Washington Blue Eagle.)
We never heed the demagogues, their millions and their minions,
But use this handy yardstick when in doubt about opinions:

Chorus

If it's In The Constitution, it's the law,
For The Constitution hasn't got a flaw.
If it's In The Constitution, it's okay,
Whether yesterday, tomorrow, or today—Hooray!

If it's In The Constitution, it must stay!
Like oysters in our cloisters, we avoid the storm and strife.
Some President appoints us, and we're put away for life.
When Congress passes laws that lack historical foundation, We hasten from a huddle and reverse the legislation.
The sainted Constitution, that great document for students,
Provides an airtight alibi for all our jurisprudence.
So don't blame us if now and then we seem to act like bounders;
Blame Hamilton and Franklin and the patriotic founders.

Chorus

If it's In The Constitution, it's the law, etc.

* By Arthur L. Lippmann, in the original *Life Magazine,* 102 (August 1935), 7; reprinted in Glendon Schubert, *Constitutional Politics* (New York; Holt, Rinehart and Winston, 1960), pp. 11-12.

TOPIC

9

Loyalty, Military Power, and Treason

> [I]f any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.
>
> —Justice Robert Jackson, dissent in *Korematsu v. U.S.*

Objectives

1. To review Supreme Court actions during and immediately after World War II.
2. To test the proposition: Is judicial decision-making influenced by wartime pressures?
3. To note reasons why the Supreme Court may change its mind on significant issues.
4. To explore further the concepts of liberty and power.

Reading Assignment

Equal Justice Under Law, pp. 84–95.

The following important events are treated in these pages: compulsory flag salutes, the evacuation of Japanese Americans to "relocation centers," the trial of foreign saboteurs before a military commission, two treason trials, and the use of courts-martial to try civilians. Obviously, this range of materials raises problems of lesson planning. Thus, background on the flag salute cases and the relocation cases are provided below.

Background: Flag Salute Cases

(The following summaries are direct quotations from Isidore Starr's *The Idea of Liberty,* St. Paul: West Publishing Company, 1978.)

Cases initiated by Jehovah's Witnesses have done more than any other religious group to probe the nature, scope, and limits of the principle of religious freedom. It has been estimated that between 1938 and 1943 they began twenty major cases before the Supreme Court, winning fourteen of them.

Among the most famous of these are the flag salute cases. Justice Frankfurter delivered the opinion of the Court and reviewed the facts of the first case, *Minersville School District v. Gobitis* [310 U.S. 586 (1940)], as follows:

> Lillian Gobitis, age twelve, and her brother William, age ten, were expelled from the public schools of Minersville, Pennsylvania, for refusing to salute the national flag as part of a daily school exercise. The local Board of Education required both teachers and pupils to participate in the ceremony. The Gobitis family are affiliated with Jehovah's Witnesses, for whom the Bible as

the Word of God is the supreme authority. The children had been brought up conscientiously to believe that such a gesture of respect for the flag was forbidden by command of scripture.

Since the Pennsylvania law required school attendance, the parents had to place their children in private schools. Because this financial expense was a hardship on the family, the father and the children brought this action against the school authorities, requesting that they be excused from the flag salute requirement.

How does one reconcile the individual's liberty of conscience, protected by the First and Fourteenth Amendments, with the state's authority to require school children to engage in such compulsory patriotic exercises as the flag salute? In this conflict of two important and desirable values, which one deserves priority?

Justice Frankfurter's answer is interesting. Religious liberty is an individual, precious right, he said, but each citizen also has political responsibilities to the community which protects this and other rights. A state can require ceremonies for all children in the promotion of national unity because "national unity is the basis for national security."

In defending the required flag salute as a means to achieve the goal of national cohesion, Justice Frankfurter speaks with eloquence:

> The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. We live by symbols. The flag is the symbol of our national unity, transcending all internal differences.

Justice Frankfurther then refers to school discipline. To require the flag salute of all children and then to permit dissenters to be excused on the basis of conscience would weaken the exercise by raising doubts in the minds of those who conformed.

Justice Stone dissented on several grounds. These children, he declared, were not lawbreakers in the usual sense of the word. What they were asked to do was contrary to their religious beliefs. In addition, the flag salute is not the only way of teaching patriotism. There are alternative procedures, such as the teaching of history, government, and civil liberty.

Finally, Justice Stone turns to Justice Frankfurter's observation that the legislature is the place to seek redress, rather than the judiciary. We are dealing here, he notes, with a small minority which is subject to the majority in the legislature. There is little reason to believe that the religious convictions of this unpopular minority will be tolerated or respected in a legislature which seeks conformity of belief and opinion in the interests of school discipline. Issues of this nature call for judicial scrutiny and protection of the liberty of religious and racial minorities. "A possible adjustment of school discipline," he concludes, "is necessary to protect the higher priorities set forth in the Bill of Rights."

West Virginia State Board of Education v. Barnette, et al. [319 U.S. 624 (1943)]. In 1943 the United States was involved in World War II and patriotism and loyalty were issues of great moment. With millions of Americans in the armed forces, the Pledge of Allegiance and the national anthem were recited frequently and with fervor. It was during this period of crisis that the Supreme Court agreed to review another flag salute case.

The background of the case, according to the Court's opinion, was as follows:

> The Board of Education [of West Virginia] on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's *Gobitis* opinion and ordering that the salute to the flag become "a regular part of the program of activities in the public schools."
>
> Failure to conform is "insubordination" dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile, the expelled child is "unlawfully absent" and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution...

A group of Jehovah's Witnesses children and their parents refused to obey the flag salute law on the ground that their religious beliefs forbade them to bow down or to serve "graven images." For them, the flag was such an "image" and they contended that God's law is superior to any government law. Instead, the children and their parents offered to make the following pledge:

> I have pledged my unqualified allegiance and devotion to Jehovah, the Almighty God, and to His Kingdom, for which Jesus commands all Christians to pray.
>
> I respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all.
>
> I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible.

The state refused to accept this as a suitable substitute. The children were expelled. State officials threatened to send them to reformatories maintained for juvenile delinquents. Their parents were prosecuted and threatened with prosecutions for causing delinquency.

Justice Jackson's opinion for the majority is studded with memorable quotations. The issue pits the state's power to control access to the schools by requiring a flag salute against the individual's rights of self-determination that touch individual opinion and personal attitude.

Although recognizing the desirability of national unity, loyalty, and patriotism, Justice Jackson warns that there are many ways of achieving this end.

> The ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity down to the fast-failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard....
>
> To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes...

His concluding words have become one of the most quoted passages in constitutional law.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.
>
> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

Justices Black and Douglas explained their switch to the majority view in a concurring opinion. They had voted with the majority in the *Gobitis* ruling because they were reluctant to have the Constitution used as a "rigid bar" against state regulation of conduct in the school. Now, they say, they were wrong because a "patriotic formula" can become a test oath and this is unconstitutional.

Justice Frankfurter was understandably annoyed by the Court's refusal to follow the precedent of the *Gobitis* case and, in his long dissenting opinion, he points out that a line must be drawn between the feelings of a judge as a person and the function of a judge as an interpreter of the Constitution.

> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores...

He went on to make a point which became pivotal in his judicial philosophy. In dealing with the interpretation of laws, judges must exercise self-restraint. The judiciary is only one of three branches of government. If people dislike laws enacted by the legislature, they should resort to the legislature to change the law. In this case, Jehovah's Witnesses and their supporters should have tried to persuade West Virginia to excuse them from the required flag salute.

Furthermore, minorities can disrupt civil society and there is nothing in the Constitution which subordinates "the general civil authority of the state to sectarian scruples." In this case, we have an act of the state legislature promoting good citizenship and national allegiance. The act may not be wise, but it is an exercise of constitutional power.

Questions/Strategies: The Flag Salute Cases

1. Should students be required to salute the flag of the United States? State your position. Would you excuse any students from this requirement? Why didn't West Virginia authorities accept the substitute pledge which was proposed?
2. Using the case study method, discuss the *Gobitis* case.
3. Three years later in *West Virginia State Board of Education v. Barnette*, the Court changed its mind and overruled the *Gobitis* decision. Can you explain the reason for the change? (What led the Court to change its mind between 1940 and 1943 was, in part, a change in its composition.During these years, two new justices had joined the Court – Justice Jackson who wrote the *Barnette* opinion and Justice Rutledge who joined him. By this time, Justice Stone, who had dissented in *Gobitis*, was now Chief Justice, and he joined Jackson. The other three who made up the majority of six were Justices Murphy, Black

and Douglas, who had sided with the majority in 1940 but changed their opinion by 1943. Justice Frankfurter, who had written the majority opinion in *Gobitis,* was now a dissenter, as were Justices Reed and Roberts. Two other developments were also influential. The *Gobitis* ruling was attacked in many newspaper editorials, law reviews, and magazines. During the period between these two cases, members of Jehovah's Witnesses were mobbed, beaten, and harassed because of their views toward the flag salute.)

4. Flag salutes can be a very exciting topic for students to examine. After all, the *Barnette* case involved students and was decided when we were at war. Doesn't loyalty or patriotism demand that we pledge our allegiance? Why should anyone be excused in wartime? Was the nature of World War II—a war against Nazism, Italian fascism and Japanese authoritarianism—a factor in the overruling of *Gobitis*? Would it make any difference if the case had involved kindergarten students? Twelfth grade students? What if it were a teacher who refused to salute the flag?

LESSON HIGHLIGHT

Arrange a debate of these issues in the context of a school board meeting. Assign students the roles of school board members, school administrators and faculty, students and parents opposed to the compulsory flag salute, representatives of the PTA, leaders of the Jehovah's Witnesses, and other interested parties. On the basis of the presentations of the various parties, have the school board decide upon a policy to be implemented in all schools.

Background: Relocation Cases

In *Korematsu v. U.S.* [323 U.S. 214 (1944)], Justice Black delivered the opinion of the Court. The following summarizes the Court's holding in his words.

> The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a "Military Area," contrary to Civilian Exclusion Order No. 34...which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to his loyalty to the United States....
>
> All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can....
>
> Exclusion Order No. 34, which Korematsu knowingly and admittedly violated, was one of a number of military orders and proclamations.... We are unable to conclude that it was beyond the war power of Congress and the executive to exclude those of Japanese ancestry from the west coast war area at the time they did.... Exclusion from a threatened area...has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores...ordered exclusion in accordance with congressional authority....
>
> Korematsu was not excluded from the military area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our west coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the west coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.
>
> Mr. Justice Frankfurter concurred.
>
> To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours.

Mr. Justice Murphy dissented. He said excluding Americans of Japanese descent went over "the very brink of constitutional power," and fell into the ugly abyss of racism.

...The exclusion...of all persons with Japanese blood in their veins...must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.

Moreover, there was no adequate proof that the FBI and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact that not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free, a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils. It seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved—or at least for the 70,000 American citizens—especially when a large part of this number represented children and elderly men and women. Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.

Mr. Justice Jackson also dissented.

Korematsu was born on our soil.... No claim is made that he is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.... Had Korematsu been one of four—the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole—only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought different than they, but only in that he was born of different racial stock.

Questions/Strategies: Relocation Cases

1. The evacuation of Japanese-Americans to "relocation centers" raised legal and moral questions. The legal issues were decided by the Court in *Korematsu.* The moral issue persists, most recently in the passage of legislation compensating those Japanese-Americans who endured that experience and who are still alive. Have students debate whether Japanese-Americans detained in relocation camps during World War II should receive any compensation. Then distribute copies of the legislation which was recently enacted, and, if possible, comments from the debate which preceded its enactment. Compare the points raised in the class debate with those discussed in Congress.
2. Compare the Court's rulings in *Korematsu* and two other cases dealing with military orders applied to Japanese Americans: *Hirabayashi v. United States* [320 U.S. 81 (1943)], which sustained a curfew order that applied to Japanese-Americans before they were relocated; and *Ex Parte Endo* [323 U.S. 283 (1944)], decided the same day as *Korematsu,* which struck down restrictions on Japanese-Americans who the government conceded were loyal. How did the justices justify their decisions?
3. In these cases, which powers of the president were at issue? On what grounds did the Japanese appeal their cases?
4. Explore the dimensions of this episode in our history. Relocations of native Americans during Andrew Jackson's presidency might be investigated as a relevant precedent. Why did we not put all descendants of our enemies in relocation centers during World War II?
5. What other legislation has been proposed or enacted to compensate ethnic and racial minorities for past injustices?
6. Only one crime is defined in the Constitution: treason. Turn to Article III, section 3, and identify the element of the crime and nature of proof needed to prove someone guilty of treason. What is the limit on Congress's power to punish traitors? Why was this condition imposed?

7. This chapter includes several other loyalty and wartime issues worth exploring. For example, compare the outcome in the cases of *Cramer v. United States* (1945) and *Haupt v. United States* (1947). What was the basis for the difference in the result? The case of the German saboteurs, *Ex Parte Quirin* (1942), like the case of *Ex Parte Milligan* (1866), questioned presidential power in time of war to try those who interfered with the war effort. Compare the outcome in these cases. The cases of *Toth v. Quarles* (1955) and *Kinsella v. Krueger* (1957) deal with the courts martial of an honorably discharged veteran and a sergeant's wife. Each was charged with murder and each contended that he or she was entitled to a civilian trial before a jury of his or her peers. How did the Court rule? What were the reasons given?

LESSON HIGHLIGHT

Refer students to the graphic illustrations of the relocation of Japanese-Americans on pages 98–99 of *Equal Justice*. Have them imagine that they are one of those sent to a detention center. Based upon their study of this period, ask them to write to a congressional representative or to a newsperson about their feelings in being placed in these camps.

TOPIC

10

The Court Clarifies the Meaning of Equality Under Law

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.

—Chief Justice Earl Warren, *Brown v. Board of Education*

Objective

To study the landmark rulings dealing with equality in education, voting, and other areas of American life.

Reading Assignment

Equal Justice Under Law, pp. 97–103, 105–107, and 112–113.

This topic focuses on the themes of political, social, and economic equality. Some of the decisions and opinions have become landmarks in our history. At the same time, some of the rulings have been criticized vigorously.

Background: Issues of Racial and Political Equality

As the United States entered the twentieth century, the genesis of organizations like the National Association for the Advancement of Colored People (NAACP) foreshadowed better things to come for American blacks. The migration of many blacks to the North, coupled with their service in the armed forces during the two world wars, exposed many whites to blacks for the first time and helped to counteract the racism of ignorance.

The Supreme Court began to depart from the precedent it established in *Plessy v. Ferguson* (allowing for "separate but equal" public facilities) when Jim Crow laws affected interstate commerce. It wasn't until 1954, however, that the Court began to question the true import of *Plessy*—whether separate could ever truly be equal—in *Brown v. Topeka Board of Education* [347 U.S. 483 (1954)] and *Brown II* [349 U.S. 294 (1955)].

The *Brown* decisions were issued by a Supreme Court headed by Chief Justice Earl Warren. The chief justice himself wrote both opinions, each for a unanimous Court.

Brown found that segregation in the public schools was harmful to black children; segregation connoted inferiority and deprived them of some benefits a racially integrated school system would provide. Since "separate but equal" facilities were inherently unequal, plaintiffs were "deprived of the equal protection of the law guaranteed by the Fourteenth Amendment."

In *Brown II,* decided the next term, the Court said that school desegregation must proceed "as soon as practicable," but "with all deliberate speed."

Although *Brown* set high goals, the national temperament evolved slowly. Some resisted any change in the status quo. Others, like Rosa Parks—who refused to go to the back of a Montgomery, Alabama, bus in 1955—helped spawn the civil rights movement. "The Movement," as it came to be known, catalyzed public opinion against racial discrimination and created its own heroes, perhaps chief among them Martin Luther King, Jr.

The *Brown* decision and rulings that followed it helped establish desegration as a fact of life, as the Warren Court used the Equal Protection Clause of the Fourteenth Amendment and other constitutional provisions to strike down other discriminatory practices.

In *Heart of Atlanta Motel, Inc. v. United States* [379 U.S. 241 (1964)], the Court used the Commerce Clause to justify restrictions on racial discrimination in public accommodations and uphold the Civil Rights Act of 1964. According to the majority opinion by Justice Clark, discrimination against blacks in the motel impeded interstate commerce:

> It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."

Moving beyond the landmark decisions of the Warren Court, which often dealt with laws that explicitly classified on the basis of race, the Burger Court has had to determine whether discrimination exists in laws that do not classify racially. In order to evaluate these laws, the Court has formulated a number of standards. These standards have been influenced by the debate between those who felt the judiciary has to assume an active role in equality issues and those who prefer to allow legislative bodies to lead the way. In addition, the Court has had to wrestle with how far laws can go to ameliorate past prejudice.

Since all laws inevitably affect some people more than others, the Court has adopted a number of tests for unconstitutional discrimination. The "reasonableness" standard declares that if classification is "rationally related to the object of the legislation" it is constitutional. Under this reasoning, the burden of proving discrimination rests largely with the complaining party.

A second standard requires that any classifications must be "substantially" related to the legislative goal. This standard effectively shifts the burden of proof to the law-making body, which must show that the classification is not only rational, but also a necessary element in achieving an important legislative objective. Using this standard, the Court struck down an Oklahoma law that allowed 18 to 20-year-old females to buy beer when males the same age could not, on the grounds that the law violated the Equal Protection Clause of the Fourteenth Amendment.

The most stringent test to determine whether classifications discriminate says laws are "inherently suspect" if they are based upon characteristics determined "solely by the accident of birth." Here the Court requires more than a "substantial" relationship between the law and its purpose—a showing that the state had a "compelling interest" in drafting the law as it did. (This standard was advanced in the majority opinion in *Korematsu,* which found that the order excluding the Japanese did indeed meet the test. See topic 9.)

Although some laws do not classify on the basis of race, sex, or religion, the Court has ruled that they can still be discriminatory. But a discriminatory *intent* must exist to establish a violation of the Equal Protection Clause, whether or not the *effect* of the law is to discriminate. Justice Lewis Powell, writing for the majority in *Village of Arlington Heights v. Metropolitan Housing Development Corporation* [429 U.S. 252 (1977)], used this distinction to declare that Arlington Heights could refuse to rezone an area to make way for low and moderate income racially-integrated housing. Such an action would not be discriminatory—although it did affect members of minority groups more than it did whites—since it followed an established zoning plan. Its *intent* was not to discriminate. However, Powell offered guidelines to help determine if similar laws intentionally discriminated: did a "clear pattern" of discrimination result from the law; what was the historical background of the law's passage; were there any departures from normal legislative procedure when it was passed?

In recent years, issues of racial equality have included "affirmative action" to provide relief for past discrimination and charges of "reverse discrimination." (See topic 15 for an analysis of decisions on these issues.)

The Court has of course tackled equal protection cases involving issues other than that of race. It stepped into the "political thicket" of vote apportionment with *Baker v. Carr* [369 U.S. 186 (1962)], p. 110 in *Equal Justice.* This decision prompted spirited debate over the extent of the Court's jurisdiction and how far its application of the Fourteenth Amendment could reach.

The facts in *Baker* were as follows. Although the Tennessee constitution required equitable apportionment every ten years, legislative districts had not been redrawn since 1901. With the twentieth century's migration to metropolitan areas, urban voters complained that their votes counted for far less than those of their rural counterparts. They appealed to the state legislature and state courts and then took their case to the federal courts—which ruled they lacked the jurisdiction to intervene in such a political issue. Justice Brennan's majority opinion in *Baker v. Carr* explained why the Supreme Court became involved:

> ...[the appellants'] constitutional claim is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population.... A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution....

Justice Clark wrote a concurring opinion:

> ...the form of government must be representative. That is the keystone upon which our government was founded.... It is well for this Court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been so clearly infringed for so long a time.
>
> National respect for the courts is more enhanced through the forthright enforcement of those rights....

Dissenters Felix Frankfurter and John Marshall Harlan felt that *Baker* allowed too much judicial intervention in political matters and opted for restraint. According to Frankfurter:

> The Court's authority—possessed neither of the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment...from political entanglements....

Questions/Strategies

1. *Brown v. Topeka Board of Education* and *Baker v. Carr* both overruled precedents. Explain. (See topic 5 for *Plessy v. Ferguson,* the case *Brown* overruled. *Baker v. Carr* overturned *Colgrove v. Green* [328 U.S. 549 (1946)]. Justice Frankfurter had written for the majority in *Colgrove,* declaring that voting apportionment was a "political thicket" the judiciary should avoid.)
2. Supreme Court decisions are not self-executing. They must be backed up by laws and statutes, by executive actions, and by force if necessary. The Supreme Court, although the final arbiter of the Constitution, has to rely on the executive branch to enforce its decisions and upon the legislative branch to add statutory substance to them. Give examples which illustrate this point. (The integration of Little Rock's Central High School in 1957, when President Dwight Eisenhower called in the National Guard to uphold *Brown,* and passage of the 1964 Civil Rights Act provide two good examples.)
3. How did Martin Luther King influence our views on racial equality, and on resistance movements in general? For an in-depth look at various leaders' role in the crusade for civil rights, teachers may wish to assign biographical essays. In addition to the Reverend King, students could profile figures like Malcolm X, Rosa Parks, John Kennedy, and Roy Wilkins.
4. The quest for women's rights has been going on for a long time. In 1971, the Supreme Court began to decide a number of issues bearing on this subject. Beginning with *Reed v. Reed* in 1971 [404 U.S. 71], trace the Court's rulings which have clarified and extended the rights of women (see pp. 112–113 of *Equal Justice.*)
5. If the Fourteenth Amendment guarantees "equal protection of the law" to all Americans, why did many people consider the Equal Rights Amendment necessary? What arguments have been advanced for and against the amendment?
6. Using the guidelines established by the Court in reviewing equal protection issues, indicate which of the following laws or actions violate the Equal Protection Clause of the Fourteenth Amendment (by placing a "V" next to the item), which are protected (by placing a "P" next to the item), and which are uncertain (by placing a "U" next to the item).

- State law requiring a citizen to pay a poll tax before being allowed to vote.
- Private club which refuses to serve a white member's black guest in the dining room or bar.
- State law allowing a property tax exemption for widows but not for widowers.
- State law denying payments for any fifth or succeeding child in a family on welfare.
- State law requiring that 10% of government construction contracts be given to minority firms.

Next, divide the class into five groups. Have each group list the reasons why the law or action is or isn't a violation of the Equal Protection Clause, and ask them to reach a consensus on the issue. Have a representative of each group report back to the class on the group's decision and reasoning.

LESSON HIGHLIGHT

In both this and the previous topics, there were numerous instances where the Court overruled the decision of some legislative body. To provide students with a sense of the various considerations which go into legislative decision making, hand out the Oklahoma legislative strategy which appears on the next page.

After the students have prepared a law to deal with the situation, appoint five students to a "court" and have them review the law for any possible equal protection violations and report back to the class with their findings. Finally, use this strategy as an opportunity to discuss the relationship between legislative and judicial bodies, what function each serves and why, and whether – as some contend – the judiciary has assumed the role of a "super legislature" in recent years. In this regard, it might to useful to refer to some of Justice Frankfurter's quotes in the flag salute and apportionment cases as arguments for judicial self-restraint.

Oklahoma Legislative Strategy

You are a member of the Oklahoma legislature. Recently you have become concerned about the number of traffic accidents which have involved young adults who have been drinking. The police department supplies you with the following statistics:

PERSONS ARRESTED BY AGE AND SEX FOR THE MONTHS SEPTEMBER, OCTOBER, NOVEMBER, AND DECEMBER, 1973 IN THE STATE OF OKLAHOMA FOR ALCOHOL-RELATED OFFENSES

		18 yrs.	19 yrs.	20 yrs.	Total Persons Arrested 18—65 and over
DRIVING UNDER THE INFLUENCE	Male	152	107	168	5,400
	Female	14	2	8	499
DRUNKENNESS	Male	340	321	305	14,713
	Female	39	33	30	1,278

OKLAHOMA CITY POLICE DEPARTMENT ARREST STATISTICS FOR THE YEAR 1973

		AGE			
CLASSIFICATION OF OFFENSES	SEX	18 yrs.	19 yrs.	20 yrs.	TOTAL For All Ages
DRIVING UNDER THE INFLUENCE	Male	47	54	72	3,206
	Female	10	1	5	279
DRUNKENNESS	Male	102	104	96	9,413
	Female	18	22	19	823

NUMBER OF PERSONS KILLED AND INJURED IN VEHICLE TRAFFIC COLLISIONS IN 1972

		TOTAL				DRIVER			
AGE		KILLED		INJURED		KILLED		INJURED	
GROUP		Male	Fem.	Male	Fem.	Male	Fem.	Male	Fem.
	Municipal	34	8	1640	1277	16	4	932	637
17-21	Other	82	26	1171	639	49	10	681	261
	Statewide	116	34	2811	1916	65	14	1613	898

What law would you propose to deal with this problem?

TOPIC

11

The Religion Clauses of the First Amendment

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...

—First Amendment

Objectives

1. To clarify the Court's interpretation of the Establishment Clause and the Free Exercise of Religion Clause of the First Amendment.
2. To further explore the concept of liberty.

Reading Assignment

Equal Justice Under Law, pp. 103–104 and 107–109.

The first ten words of the First Amendment are referred to as the Establishment Clause, which Thomas Jefferson believed established "the wall of separation between Church and State." The remainder of the sentence protects the free exercise of religion. What seems at first a clear distinction takes on dimensions of complexity when applied to specific cases.

Background: Free Exercise of Religion

The cases in this area deal with a confrontation between state police power (to protect the lives, health, morals, welfare and safety of the people) and the claims of religious groups to uphold tenets of their faiths.

The first case summarized here, *Wisconsin v. Yoder* [406 U.S. 205 (1972)], is drawn from the book *The Idea of Liberty,* by Isidore Starr (St. Paul, MN: West Publishing Co., 1978). See *Equal Justice,* pages 107–109, for a full discussion of the facts of the case.

Briefly, the case began when the state of Wisconsin tried to enforce compulsory education laws – which provided that all students must attend school until the age of sixteen – against the parents of Amish children, who by tradition had ceased formal education at fourteen.

Before the case went to trial, the attorney for the Amish suggested a compromise settlement to the state superintendent of public instruction. He proposed that the Amish establish their own vocational training center. Using a Pennsylvania plan as a model, it was suggested that the children would attend the center for three

hours a week, where they would be taught English, social studies, math and health by an Amish teacher. During the rest of the week, the children would perform farm and household duties under the supervision of their parents. In addition, they would keep a journal of their activities. The superintendent refused to accept this plan on the ground that this type of education would not be "substantially equivalent" to that given in the schools of that community.

The arguments presented on behalf of the Amish are based on the Free Exercise of Religion Clause of the First Amendment, as applied to the states by the Fourteenth Amendment.

Their objection to the public secondary schools is stated in the following terms in the Court's opinion:

> . . .The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

According to one expert, if the Amish children were required to attend public high schools, the conflict between the worldly values of a secular society and the non-worldly values of a religious society would do psychological harm to them. Torn between the requirements of the school and the demands of their religion, the children might leave their church and this would mean the end of the Amish Community.

However, how far can one go with this argument? Since there are several hundred religious sects, would you approve many exceptions to compulsory education? After all, the public schools, unlike the private and parochial schools, bring together children from the neighborhood or the community. The public schools seek to develop a commonality of interests in the pursuit of the goals of American life. It is here that all creeds, colors, and religious groups meet on an equal footing and learn to live together. At least this is one of the foundation stones upon which the public schools are built. To ask for exceptions from this requirement, one must present a value which has greater priority than universal public education. Can freedom of religion make this claim?

Chief Justice Burger delivered the opinion of the Court, with which Justice Douglas dissented only in part. The chief justice begins his opinion with the observation that we are dealing here with a 300-year-old religion. For this religious group to sustain its claim that religious freedom has priority over the claim of compulsory public education, it must prove that its religious faith and its mode of life are inseparable. The record of the trial shows that the Amish way of life is church-oriented, while the life around them is secular and charged with pressures to conform. To force them to comply with the compulsory education law means that they either leave the state and search for a more tolerant environment or risk the loss of their children to a secular society.

In the first place, says Chief Justice Burger, it should be remembered that religious sects like the Amish have played an important role in history.

> We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is "right" and the Amish and others like them are "wrong." A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.

We agree, replies the state of Wisconsin, but let us suppose that some of the Amish children decide to leave their religious sanctuaries and venture out into the world at large. Wouldn't they be ill-equipped for life in a secular society?

There is no merit in this type of argument, answered Chief Justice Burger, because the Amish offer their children an "ideal" vocational education during the adolescent years. Skills in farming and manual labor are developed, as are qualities of reliability, self-reliance, and dedication to work. The Amish instill in their children the social and political responsibilities of citizenship. The record in this case disclosed that the Amish in Green County had never been known to commit crimes, to receive public assistance, and to be unemployed. One or two years of high school would not necessarily match this type of education.

The Court had to answer two other interesting lines of argument. The first was based on the state's police power to protect the lives, health, morals, safety, and welfare of all the people. The Court responded that there is nothing in the record to show that the health, or safety, or welfare of the children have been endangered by the actions of the parents.

The second point deals with the charge of Justice Douglas, in his dissenting opinion, that this case disregards the wishes of the children. Only one of the three children testified that she agreed with her parents. The other two children were not called so that we do not know their thoughts and feelings on the issue. To this,

Chief Justice Burger replied that the children are not the parties in this case. Futhermore, the state of Wisconsin never raised this point.

The opinion concluded with a summary of the findings and with this instruction to the state:

> Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the Old Order Amish or others similarly situated. The States have had a long history of amicable and effective relationships with church-sponsored schools, and there is no basis for assuming that, in this related context, reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance, provided always that state regulations are not inconsistent with what we have said in this opinion.

Justice Douglas in dissent notes that in its opinion the Court had referred to the Reynolds case, often referred to as the Mormon Polygamy case. In that case the judgment against the Mormons was based on a distinction between belief and action growing out of the principle of freedom of religion. Belief was permitted, but action regarded as anti-social by the state was prohibited. The Mormons were free to believe in plural marriages, but the state could lawfully forbid them to practice them. The Court's ruling in the Amish case seems to contradict the precedent of the Reynolds case. It is a good thing, too, remarks Justice Douglas, and hopefully, the Reynolds precedent will be overruled in time.

Questions/Strategies: Free Exercise of Religion

1. What values are at stake in the Amish case? What goal does the state seek to achieve? Why does it think this goal is important? What goal do the Amish seek? Why do they believe it is important?
2. How would students decide this case? Would any of them apply the belief/action distinction? How would that affect their decision in the case?
3. Below are other religiously-based issues which have come before the Court. Identify which religions have such practices and why. Indicate whether you believe these practices would be constitutional or not by placing them on the continuum from those that would be most protected to those that would be least protected. Give reasons for your decisions.
   - Refusing blood transfusions
   - Refusing to work on the Sabbath
   - Taking drugs
   - Plural marriages
   - Snake handling

least protected ——————————— most protected

4. Ask students to role-play a situation in which parents object to the teaching of evolution in the schools because it conflicts with their religious views. What arguments will they advance to support their view that the Constitution protects their children's beliefs? What arguments will the school authorities advance? The 1968 case of *Epperson v. Arkansas* [393 U.S. 97], in which the Court unanimously struck down an Arkansas statute prohibiting the teaching of evolution, might be a useful starting point for students. It is summarized in Isidore Starr's *The Idea of Liberty* (St. Paul, MN: West Publishing Co., 1978).

Background: The Establishment Clause/School Prayer

Share the following brief case summaries with students. They are adapted from the book *The Supreme Court in American Life,* by Leonard F. James, Glenview, IL: Scott, Foresman and Co., 1971. (See *Equal Justice,* pages 103–104, for a discussion of the facts of *Engel v. Vitale,* which involved a nondenominational prayer, recommended by the state, which a local school board had adopted as a recitation for students.)

Engel v. Vitale [370 U.S. 421 (1962)]. The plaintiffs (Steven Engel was alphabetically the first) argued that New York State was actually "establishing" a religion with which they could not agree. The respondents (William Vitale represented the school board) replied that they were not "establishing" any one religion but were only providing a chance to say a prayer.

In 1962, after the case had been appealed from the court of appeals, the Supreme Court handed down a decision. With only one dissent, the Court ruled that the New York State requirement was invalid. Justice Black spoke for the Court.

> We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York had adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regent's prayer is a religious activity. . . .

It is a matter of history that this practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America....

...The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office....

It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong. The history of man is inseparable from the history of religion. And perhaps it is not too much to say that since the beginning of that history many people have devoutly believed that "More things are wrought by prayer than this world dreams of." ...And there were men of this same faith in the power of prayer who led the fight for adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid the sort of governmental activity which New York has attempted here. These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either....

It is true that New York's establishment of its Regents' prayer as an officially approved religious doctrine of that state does not amount to a total establishment of one particular religious sect.... However, it may be appropriate to say in the words of James Madison, the author of the First Amendment: "It is proper to take alarm at the first experiment on our liberties."

Justice Potter Stewart disagreed with the majority opinion, and wrote a dissent.

With all respect, I think the Court has misapplied a great constitutional principle. I cannot see how an "official religion" is established by letting those who want to say a prayer say it....

...[What New York] has done has been to recognize and to follow the deeply entrenched and highly cherished traditions of our Nation—traditions which come down to us from those who almost two hundred years ago avowed their "firm Reliance on the Protection of divine Providence" when they proclaimed the freedom and independence of this brave new world.

The Court's decision aroused a wide divergence of opinion. On the one hand were those who believed that it struck "at the very heart of the Godly tradition in which America's children have for so long been raised." On the other hand there were those who felt it "placed another obstacle in the path of those would would use the power of the State to force belief in religion and politics."

Abington School District v. Schempp [374 U.S. 203 (1963)]. In 1963 the Supreme Court ruled on the question of Bible reading in public schools. A Pennsylvania law stated that, "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day." The question raised by the Edward Schempp family was the same as in the Engel case, and the Court ruled much as it had in that case. Justice Tom C. Clark spoke for the 8–1 majority.

It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion...may not be effected consistently with the First Amendment. But the exercises here...are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion...

...In the relationship between man and religion, the State is firmly committed to a position of neutrality.

Questions/Strategies: The Establishment Clause/School Prayer

1. Distinguish the rulings in these cases. Do these cases outlaw voluntary prayers in public schools? If not, what are their holdings?
2. Should students be *required* to say prayers in public schools? Should students be *allowed* to say prayers in public schools?
3. School prayer is of such importance to many students and their parents that it warrants in-depth treatment. Assign students to research the various proposals which have emerged since the *Schempp* case, including the school prayer amendment. Have them summarize the arguments on both sides of the issue. Arrange a debate—formal or informal—on the issue. If possible, invite community members to participate.

4. Before asking students to research the cases on aid to parochial schools, ask them whether they would allow or disallow the following aid to parochial schools:
   - Pay tax monies for bus transportation of public and parochial students to their schools;
   - Buy with tax monies secular textbooks which will be loaned to parochial schools;
   - Use tax funds to defray part of the salaries of parochial school teachers;
   - Provide parochial schools with such state-financed services as standardized tests and scoring, assistance, therapeutic guidance, remedial services, field trips, and loan of instructional materials and equipment.

   Ask them to defend their positions. After they have been exposed to the Court's reasoning, ask them if their opinions have changed, and why.
5. Why do the justices view aid to parochial colleges differently from aid to elementary and high schools? Does their reasoning seem persuasive?
6. Can the state be sure that funding certain programs in parochial schools will not indirectly be used to further religion?

LESSON HIGHLIGHT

The tension between the First Amendment's two religion clauses— [1]"Congress shall make no law respecting an establishment of religion, or [2] prohibiting the free exercise thereof. . . ."—is often felt when government seeks to accommodate religious practices. By seeking to accomodate the needs of a religion and its adherents, is the government impermissibly establishing that religion? Two cases from the Supreme Court's 1984-85 docket, undecided at the time of this writing, raise these perennial questions once again.

1. In *Estate of Donald Thornton v. Caldor, Inc.*, Docket No. 83-1158, a Connecticut man sought to observe the Sabbath by attending Sunday Presbyterian services. His employer, a retail store, refused to honor his request, instead offering to move him to a remote store which was closed on Sunday or to demote him to a nonsupervisory position at the store he worked at, which would lower his salary but not require Sunday work. He sought the protection of a Connecticut law which provides: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day...." Ask students:
   - Is the law constitutional because it protects any individual's right to practice the religion of his or her choice?
   - Or is it unconstitutional because it impermissibly establishes religion? Specifically, does it fail to meet any prong of the Court's three-part test for adjudicating Establishment Clause cases: the statute must have a secular purpose; it must neither advance nor inhibit religion; and it must not foster excessive government entaglement with religion?
2. *Holly Jensen v. Frances J. Quaring*, Docket No. 83-1944, pits an individual's sincere religious aversion to "graven images," drawn from her literal reading of the Second Commandment, against Nebraska's decision to require photographs on driver's licenses.

   Frances J. Quaring lives on a farm and needs a driver's license to participate in the family business and to get to her parttime job in a nearby town. The state requires a photograph on all licenses because photographs permit law enforcement officers to immediately verify a person's identity, so the requirement contributes to public safety on streets and highways and helps assure the security of financial transactions. Since Quaring refuses to be photographed, the state would not issue her a license. Ask students:
   - Does the requirement of a photo constitute a burden on Quaring's free exercise of her religion?
   - Is there a less restrictive alternative to the photo requirement that will serve the state's interest in automotive safety?
   - Does creating an exemption to the photo requirement, based solely on religious grounds, violate the Establishment Clause of the First Amendment?

Have students research previous cases on this tension between two First Amendment guarantees and learn more about these two cases. Then have them conduct moot court arguments on the cases. At the conclusion of the moot courts, ask how they would decide the cases, then compare their decisions and reasoning with the Court's actual holdings. (*Preview of U.S. Supreme Court Cases,* a publication which provides advance looks at all cases orally argued before the Court, contains excellent articles on these two cases as they await decision. See pages 94-96 and 199-201 of the 1984-85 term of *Preview.* Issues of *Preview* containing these cases are available for $2.50 each from *Preview,* American Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611.)

TOPIC

12

Freedom of the Press Cases in the 1970s

> [T]he Government's power to censor the press was abolished so that the press would remain free forever to censure the Government. The press was protected so that it could bare the secrets of Government and inform the people.
>
> —Justices Hugo Black and William O. Douglas, concurring opinion in the Pentagon Papers case

Objectives

1. To further explore the concept of liberty.
2. To examine the issues and rulings of several important freedom of the press cases of the 1970s

Reading Assignment

Equal Justice Under Law, pp. 109–112.

Freedom of the press is one of the major themes which wends its way throughout our history. It is regarded as the bulwark of "the right to know," a principle basic to the idea of democracy. From the time of the historic Zenger case until the present, newspapers and other media have played an important role in educating the public, exposing corruption, publicizing achievements, and exploring topics of importance to the body politic. Recently, however, some commentators have argued that the press has abused its rights and ignored responsibilities implicit in the Constitution.

As the chart included in this topic indicates, eight important freedom of the press issues reached the Court in the 1970s. Space will not permit a full discussion here, but several cases are summarized to give students a head start.

Background: "No Law" or Balancing Act?

The First Amendment pronouncement regarding freedom of the press seems to be absolute—"Congress shall make no law abridging the freedom of . . . press . . .", but over the years most jurists and commentators have seen this prohibition as a general commandment subject to exceptions in certain cases. In general, the Court has evolved a "balancing" test to determine whether material may, within the Constitution, be prohibited from publication. This test has usually placed a very heavy burden on those who would restrict freedom of the press. However, it recognizes important values inherent on both sides of the question, and the courts must weigh these interests in seeking justice. Note that all of the cases discussed here raised reasons (values, circum-

stances, etc.) for limiting freedom of press. Have students, along with the justices, weigh these considerations in deciding the cases. At the same time, they should always be aware of the importance our Constitution places on unlimited expression.

The first two cases are summarized from an article by Judge Alfred T. Goodwin and Lynn Taylor which appeared in the Winter, 1978, issue of *Update on Law-Related Education.* The final case is adapted from an article by Mary Manemann which appeared in the Spring, 1985, *Update.*

Nebraska Press Assoc. v. Stuart. On the night of October 18, 1975, Erwin Simants, an unemployed handyman with an I.Q. of 75, took his brother-in-law's gun and walked to the house next door. He then raped and shot at point-blank range ten-year-old Florence Kellie. As other family members came to her aid, he also shot them. In all, six members of the Kellie family were murdered. Investigators later found evidence of necrophilia.

As shocking as the crime was, the trial would have interested mainly Nebraska media except for the series of events that followed Simants' arrest. Local officials in the town of 850 people gave the press conflicting stories and withheld information. The judge presiding over the preliminary public hearing (required in Nebraska to establish that cause exists to hold an accused person for trial) granted a joint motion by the prosecutor and public defender to prohibit the media from reporting on the proceedings of the hearing, which lasted almost a full day. The media thus couldn't report the testimony of nine witnesses, who detailed many gruesome aspects of the crime.

The press, understandably, was angered by the nearly total news blackout, and the constitutional fight was on. Nebraska news organizations appealed the restraining order to District Judge Hugh Stuart in Lincoln. Although he rescinded the earlier order, he substituted one which—while more limited in scope—still prohibited considerable material from being disclosed to the public.

Still not satisfied, the Nebraska Press Association appealed the decision to the Nebraska Supreme Court and later to the United States Supreme Court, in *Nebraska Press Association v. Stuart* [427 U. S. 539 (1976)]. Judge Stuart and the state of Nebraska argued that the publicity surrounding the crime would make it difficult to impanel an impartial jury, thus jeopardizing Simants' right to a fair trial. They pointed out that Nebraska law required a trial within six months of arrest and that a change of venue would move the trial only to adjoining counties, which had been subject to essentially the same publicity as the county in which the crime was committed. The Nebraska Press Association, joined by NBC and other national news organizations, argued that the order flew in the face of the First Amendment's guarantee of a free press, thus jeopardizing the public's right to know.

Chief Justice Burger, speaking for a unanimous Court, acknowledged the conflict between the guarantees of free press and fair trial, but denied that the Court was forced to choose, once and for all, which right had precedence: "The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. . .and it is not for us to rewrite the Constitution by undertaking what they declined to do." Rather, the chief justice continued, it was necessary to consider closely the circumstances of this case in reaching a more limited decision.

The chief justice noted that many cases established the defendant's right to trial by an impartial jury, guaranteed in federal cases by the Sixth Amendment and extended to the states by the Due Process Clause of the Fourteenth Amendment. He pointed out that the case of Dr. Sam Sheppard, *Sheppard v. Maxwell,* [384 U.S. 333 (1966)], had established that excessive pretrial publicity could result in an unfair trial and that "trial courts must take strong measures to ensure that the balance is never weighed against the accused."

Did that mean that the Court was deciding in favor of the trial judge and his gag order? Not necessarily. The chief justice pointed out that a long series of cases had established that "any prior restraint on expression comes to this court with a 'heavy presumption' against its constitutional validity." That means that those who would gag the press have a heavy burden of proof. They must prove that (1) no lesser means would accomplish an important purpose and (2) that the gag order would in fact work.

The chief justice said that Judge Stuart and the state had failed to show other alternatives wouldn't have assured a fair trial. These alternatives included (1) changing the "trial venue to a place less exposed to the intense publicity"; (2) postponing the trial to allow the publicity to subside; (3) questioning prospective jurors to "screen out those with fixed opinions" on guilt or innocence; and (4) using "emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court." The chief justice added that sequestering the jury might also help. Even though sequestering jurors would occur after the pretrial publicity, it would lessen the impact of that publicity and emphasize the jurors' duty to rely solely on the evidence presented during the trial.

Chief Justice Burger went on to note that Judge Stuart and the state had not proved that the gag order would have worked anyway. After all, the Nebraska court's jurisdiction was limited only to a portion of the state. Besides, Burger said, predicting what information will undermine a juror's impartiality is difficult, as would be drafting an order that would specify which information should be kept from potential jurors. Finally, the crime occurred in a small community where rumors would pass swiftly by word of mouth.

The Nebraska Press Association decision was hailed as a major victory for the press, but a close reading shows that it was not a blanket victory. The chief justice explicitly rejected the contention that the First Amendment must always prevail. Rather, he said there is a very strong presumption against prior restraint on the press in criminal cases. But he would not preclude the possibility of a future case that would justify such extreme measure.

Another portion of the decision, however, did give the press an unqualified victory. The Court ruled that the judge erred in prohibiting the press from reporting on the preliminary hearing, which was held in open court. Burger pointed out that the *Sheppard* decision established that "there is nothing that proscribes the press from reporting events that transpire in the courtroom." Exclude the press with a closed hearing, Burger said, do not hold an open hearing and bar the press from reporting what went on there.

The Pentagon Papers Case. Antagonism between the press and government grew in the 1960s and 1970s as the press more frequently challenged the right of government units to keep information from the public. The most notorious instance, of course, is the Pentagon Papers case. Daniel Ellsberg, a former government employee, had leaked classified documents on U.S. involvement in Vietnam to the *New York Times* and the *Washington Post.* When the newspapers began publishing the documents, the federal government sought an injunction to prevent them from being published. The court of appeals for New York granted the injunction, but the court of appeals for the District of Columbia refused it. With these conflicting opinions before them, and with both sides agreeing on the urgency of the case, the justices of the U.S. Supreme Court heard the case immediately and handed down a decision only four days after arguments were heard.

Though *New York Times Company v. U.S.* [403 U.S. 713 (1971)] and the *Nebraska Press* case arise from very different circumstances, their fundamental issue is the same: Can the government impose prior restraint on publication to prevent the disclosure of allegedly harmful information? As in the *Nebraska Press* case, in *New York Times* the Court decided the government had not met its heavy burden of showing that circumstances posed a grave enough threat to justify prior restraint.

Of the six justices who constituted the majority in the Pentagon Papers case, three – Justices Black, Douglas, and Brennan – took what might be called the absolutist position, stressing that under the First Amendment the press must be free to publish news without censorship, injunctions, or prior restraints. They argued that the purpose of the First Amendment was to stop the government from suppressing embarrassing information. The other three justices in the majority – Justices White, Stewart, and Marshall – took a narrower view, noting the government had not proved that disclosure of the documents would "surely result in direct, immediate, and irreparable damage to the nation or its people," and thus prior restraint could not be tolerated. They also observed that the government had erred in seeking the injunctions, suggesting that a more constitutionally defensible course might be to take action *after* publication against those who publish classified information.

The three judges who dissented – Chief Justice Burger and Justices Harlan and Blackmun – complained that the case was decided in unseemly haste and without an adequate record. They argued the First Amendment right was not absolute and suggested if the record showed that publication would pose grave dangers, prior restraint might be upheld.

Zurcher v. Stanford Daily [436 U.S. 547 (1978)]. During a demonstration at the Stanford University Hospital in April 1971, reporters from the student newspaper photographed rioters who assaulted and injured police officers called in to quell the disturbance. The *Stanford Daily* ran various articles and photos in a special issue that week. When the Palo Alto police department saw the special issue, it decided the *Daily's* files could help it identify the rioters who had attacked its officers. The police wanted the photographs the *Daily* had, published and unpublished, and could try using either a subpoena or a search warrant to get them. A subpoena would give the *Daily* the chance to acquiesce peaceably, challenge the request for the subpoena in court – or to destroy the photographs and negatives before the police could see them. The Palo Alto police opted for the warrant, in part because they feared *Daily* staffers might pick the last alternative. But after rummaging through the *Daily's* photo laboratories, filing cabinets, desks and wastepaper baskets, the police left the newsroom empty-handed.

After the search, the *Daily* filed a lawsuit against James Zurcher, chief of police, and the Palo Alto police department, charging that its First and Fourth Amendment rights had been violated.

Lower courts sided with the *Daily,* but when the Supreme Court decided the case in 1978, it overruled them by a six-to-three vote. According to Justice White's majority opinion, requiring a subpoena to obtain information from news organizations would be a "severe burden" on the law enforcement duties of the police.

> Properly administered, the preconditions for a search warrant (probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness), which must be applied with particular exactitude when First Amendment interests would be endangered by the search, are adequate safeguards against the interference with the press' ability to gather, analyze, and disseminate news....
>
> Nor are we convinced...that confidential sources will disappear and that the press will suppress news because of fears of warranted searches.

In a concurring opinion, Justice Lewis Powell noted that it was doubtful whether the *Daily* could make a "clear showing" that evidence would not be destroyed. In fact,

> The *Daily* had announced a policy of destroying any photograph that might aid prosecution of protesters.... Use of a subpoena, as proposed by the dissent, would be of no utility in the face of a policy of destroying evidence.

Speaking for the dissent, Potter Stewart stressed the confidential nature of reporter-source relationships:

> In requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity not be revealed will be less likely to give that information if he knows that, despite the journalist's assurance, his identity may in fact be disclosed.... Since the indisputable effect of such searches will thus be to prevent a newsman from being able to promise confidentiality to his potential sources, it seems obvious to me that a journalist's access to information, and thus the public's, will thereby be impaired.

Stewart also answered the majority's claim that the press had no constitutional right to special treatment:

> Perhaps as a matter of abstract policy a newspaper office should receive no more protection from unannounced police searches than say, the office of a doctor or the office of a bank. But we are here to uphold a constitution. And our Constitution does not explicitly protect the practice of medicine or the business of banking from all abridgments by government. It does explicitly protect the freedom of the press.

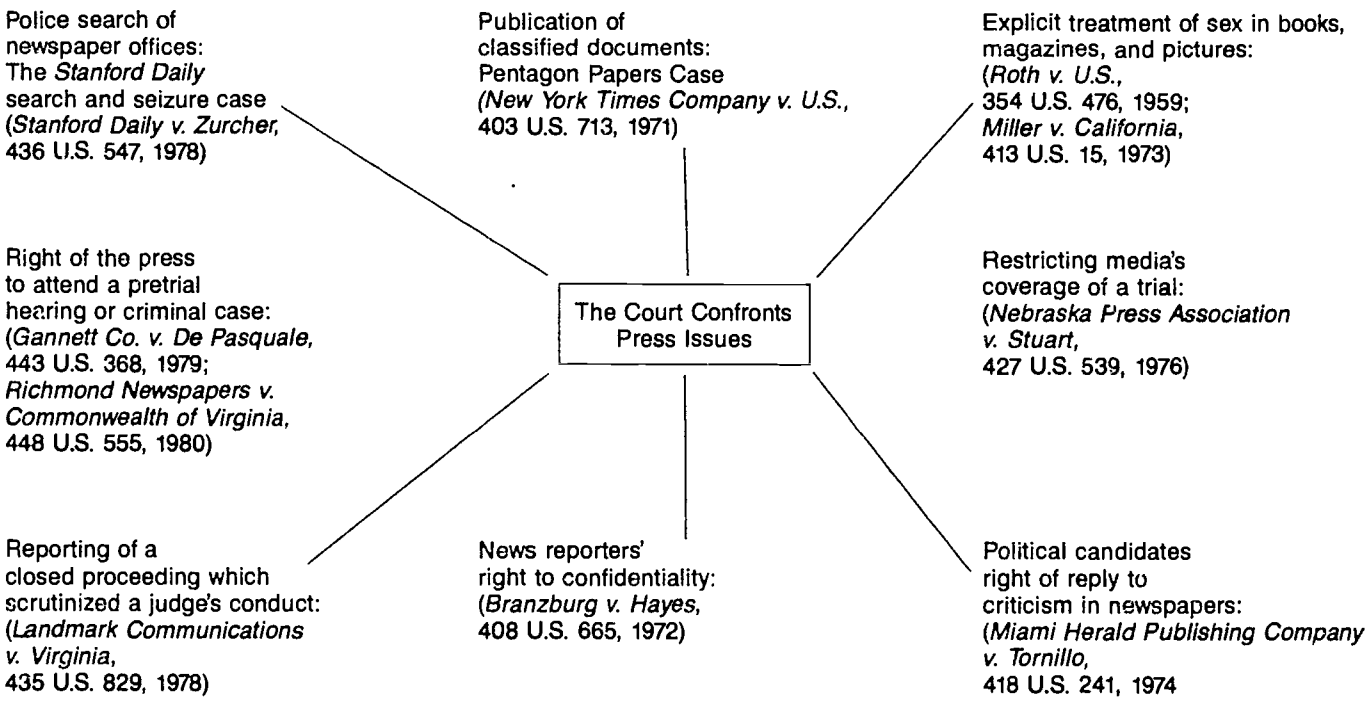
Questions/Strategies

1. Do you think a judge is ever justified in ordering the press not to publish certain information regarding a pending criminal case? If you were a reporter in the Nebraska case, how would you have replied to the judge's order? What is your view of the Supreme Court ruling?
2. Should a state commission or a court have the power to exclude the press or other media from a hearing or a trial? If you were a judge, under what circumstances might you decide that reporting proceedings would be detrimental to a fair hearing or trial? Why did the Supreme Court seem to have difficulty with the three "closing" cases noted on the chart included in this topic?
3. Using the case study method, examine the Pentagon Papers case. In view of the importance of this unusual controversy between two important newspapers and the government of the United States, several student reports would be helpful. Since there were nine opinions, a brief summary of each justice's reasoning will illuminate how those on the high bench grapple with difficult cases.
4. Compare the decisions in *Stuart* and the Pentagon Papers case with the much earlier case of *Near v. Minnesota* (topic 7, *Equal Justice* pp. 69, 71). Discuss the concept of prior restraint. What are alternatives to suppressing the news?
5. After reading the discussion of the *Zurcher* case, divide the class into newspaper publishers and police officers. Have them debate the merits of the *Stanford Daily* search and seizure decision.
6. In most states, priests, attorneys, ministers, and doctors have the privilege of confidentiality. Why shouldn't reporters have it too?
7. For years, the Court has been trying to clarify its position on pornography and obscenity. What are the constitutional issues involved in these types of cases? Summarize the Court's 1973 ruling in this area (see *Equal Justice,* p. 110), and give your reaction to the new set of guidelines to be followed in these issues. How well were these guidelines followed in subsequent cases?
8. If a candidate for public office is unfairly criticized during his or her campaign by a newspaper or other media outlet, why shouldn't that candidate have a "right to reply?" Give your reaction to the Supreme Court ruling noted on the chart.

LESSON HIGHLIGHT

On the basis of the chart and the discussion of the questions in this topic, which rulings would you applaud if you were newspaper or media representatives? Which would you oppose? What are your reactions to these rulings as citizens of the community? Have media representatives, and judges, and/or other community leaders attend class to discuss the issues presented in this section.

The Court Rules on Freedom of the Press Issues



TOPIC

13

Justice: The Due Process Revolution

We, the people of the United States, in order to form a more perfect Union, establish justice. . . .

—Preamble to the Constitution of the United States

Objectives

1. To discuss the idea of due process and changes in that concept which have occurred in this century.
2. To explore the great changes in criminal procedure which took place under the Warren and Burger Courts.
3. To address the concept of justice.

Reading Assignment

Equal Justice Under Law, pages 71–77, 81, 84–87, 94–97, 105, 107, 116–117.

As the quote beginning this topic indicates, the quest for justice goes back to the very origins of our constitutional republic. Any number of the cases and topics discussed in these pages could be treated under the concept of justice. For example, the very title of Richard Kluger's landmark book on the *Brown v. Board of Education* case, *Simple Justice*, indicates that this case, which we've treated under the rubric of "equality," could as easily be treated under the rubric of "justice."

Generally, lawyers and courts look upon the concept of justice as inseparable from the concept of due process. As many commentators have noted, "due process" is to legal fact-finding what the scientific method is to scientific experimentation—it is the means by which truth is discovered.

Background: Due Process

(The following introduction to due process and strategies for teaching about it are drawn from an article by Patricia McGuire which appeared in the Winter, 1981, issue of *Update on Law-Related Education*).

"Who will police the police?" Even at this paraphrased distance of several thousand years, the concern expressed by Plato over the potential excesses of the Republic's "guardian" class has a familiar ring. Two hundred years ago, the Constitution's authors, facing the same concern, decided to put their fate, and ours, in a "government of laws, not men." A written Constitution, not a philosopher king (or queen).

Even so, upon completing the main body of the written document, the Framers realized that something was still missing. The government of law, so logical on paper, was to be implemented by men and women none the less, and so would be subject to the infinite variety of human interaction, conflict, and excesses. How should the governors be governed? The answer was proposed in the Bill of Rights.

Beyond enumerating specific individual fundamental rights, such as freedom of speech and religion, beyond mandating specific processes for certain governmental interactions with individuals, such as the requirement for grand jury indictments, the authors of the Bill of Rights recognized the necessity to create a watchdog to guide and restrain all government encroachment upon the fundamental human interests in life, liberty, and property. The watchdog is "due process of law."

The ultimate limitation of arbitrary governmental action lies in the Fifth Amendment: "No person shall be...deprived of life, liberty, or property, without due process of law...." Over 100 years ago, this same language, with one important variation, was again included in an amendment to the Constitution: "... nor shall any State deprive any person of life, liberty, or property, without due process of law...." The Fourteenth Amendment operates to impose upon state governments the same due process watchdog as the Fifth Amendment imposes upon the federal government.

Neither the words "due process" nor the concept were new in 1791. The conceptual roots lay in King John's Magna Charta, and the words evolved through later centuries. Yet even today, 770 years after Runnymede, 194 years after the ratification of the Constitutuion and Bill of Rights, debate rages. What is due process of law, and what does it require of our government? What does due process require of "we the people" who are ultimately responsible for making it work?

The Supreme Court struggles with this issue annually: When must an attorney be made available? When must statements of an accused be excluded from a trial? What can a reporter publish prior to a trial? Nor are the questions all related to criminal processes. Perhaps even more complex and subtle questions arise in the civil areas: What kinds of procedures are required before a federal agency imposes regulations on a private industry? What processes must a zoning commission pursue before granting a variance? May state law allow a tenant to be evicted without notice or a hearing?

The preceding paragraph illustrates the first important fact about due process for teachers of law-related education: due process is not an isolated issue to be taught in a vacuum. Due process is a concept which cuts a broad swath through all legal topics; it's not just for the Bill of Rights teachers.

The second important fact about due process lies in its very definition. The right to due process means that the government cannot infringe upon citizen rights without fair procedures. Fair procedures have been interpreted to mean, at the very minimum, that the government must give the citizens some notice of the actions it plans to take, and also that the citizens must have an opportunity to respond, to be heard.

Due process does not mean that the result of the fair procedures will be favorable to the citizen. Due process does, however, assume that the result of fair procedures will be the achievement of justice.

Questions/Strategies: Due Process

Through this series of exercises, students will learn to define "due process," to identify the sources of due process in the U.S. Constitution, to identify due process encounters in their own experience, and to analyze whether given factual situations require constitutional due process.

1. *Definition Brainstorm.* Begin by writing "Due Process" on the board and asking students to write a one sentence definition. Then have students read their answers, while you list their responses on the board. Looking at all the responses, ask for student consensus on one universal definition.
2. *Identification of Sources of Due Process.* Ask students to identify the source of their definitions of due process. List on the board as responses are given. Ask a student to read aloud the Fifth and Fourteenth Amendments.
3. *Discussion Questions.* What does the Fifth Amendment say? What does the Fourteenth Amendment say? What is the difference between the Fifth and Fourteenth Amendments?

   What is the meaning of "life, liberty, and property?" Identify other places in the Constitution where aspects of these interests are also protected (i.e., Bill of Rights).
4. *Identification of Personal Due Process Experiences.* Ask students to think about instances in which they (or someone they know) have been treated fairly or unfairly by a public agency. Have volunteers recite their experiences (examples might include encounters with the police or juvenile justice system; a summer job or other work experience; a consumer problem; or a school discipline experience). After hearing each experience, discuss with class why each example of treatment was fair or unfair; what could or should have been done differently.

5. *Problems for Analysis.* Given each of the following problems, students should determine whether the citizens have a right to due process, and, if so, what the procedures should be.
   - An unwed father does not want his girlfriend to put their child up for adoption, but the state law requires only the mother's consent for the adoption of illegitimate children.
   - A tenant has just received notice that the private owner of the building has sold it to a developer for the purpose of converting it to a condominium. Local housing law is silent on the issue of condominium conversion.
   - Residents of a local neighborhood have complained for several weeks about being disturbed by crowds of teenagers hanging out in the street and playing radios at night. One night the police spot three youths sitting on the curb, and take them to the local police station for loitering.
   - Many years ago, the zoning commission allowed an old chemical dump to be rezoned for a new housing development. After a recent rash of serious illness among the residents of the development, the board of health declares that the development must be closed and destroyed. The residents are told to sell their homes.
   - The local transit system has announced that it will raise fares by 25 cents. A group of regular commuters thinks this in unfair.

   (To teachers: please note that your local or state laws or regulations may differ from the examples cited above. Please tell the students to assume the existence of the problem as stated. After the students state whether the citizens should have a due process right [is the government denying them life, liberty, or property without due process?], and what procedures should be used, then it would be appropriate to discuss your local laws and procedures.)

Background: Extending Federal Due Process Guarantees to the States

Pages 71–77 of *Equal Justice,* along with the photos and captions on later pages, do an excellent job of recapitulating the Supreme Court's growing review of state criminal court decisions that seemed flagrant denials of justice. The cites for the cases discussed are as follows: The Elaine, Arkansas, case in which the Court overturned a trial because the threat of mob violence rendered it a sham is *Moore v. Dempsey* [261 U.S. 82 (1923)]. *Powell v. Alabama* [287 U.S. 45 (1932)] is the first Supreme Court case to arise from the prosecution of the Scottsboro Boys. In it the Court determined that in capital cases (e.g., when the death penalty is a possibility) the state has an obligation to provide effective counsel for the defendants. The second Scottsboro case is *Norris v. Alabama* [294 U.S. 587 (1935)]. There the Court determined that while Alabama's laws did not explicitly exclude blacks from juries, the defense was able to show that Alabama excluded blacks in practice. In an unusual step, the U.S. Supeme Court reviewed the facts in the record, reversed the trial judge, and ordered new trials. Preventing blacks from jury service in practice became as unconstitutional as doing it directly by law.

In the Tom Mooney case, *Mooney v. Holohan* [294 U.S. 103 (1935)], the Court held that due process can not be satisified "if the state has contrived a conviction through a pretense of a trial... through a deliberate deception of court and jury by the presentation of testimony known to be perjured."

The tendency to scrutinize the work of state courts for possible due process violations became more pronounced in the decades following World War II. A number of the landmark cases of the Warren Court "federalized" due process standards across the country. Whereas before the states had been allowed wide latitude to establish standards for their own courts, now they would have to meet standards imposed by the U.S. Constitution. It's important to note that the standards required by the federal Constitution are minimal standards. States cannot offer less than these minimums and meet the requirements of the federal Constitution. However, nothing prevents the states from providing more than these minimums.

Pages 94–97 of *Equal Justice* discuss two attempts to ensure more perfect due process in state criminal procedure which were mandated by the U.S. Supreme Court. *Gideon v. Wainwright* [372 U.S. 335 (1963)] held that the state had to provide counsel for poor defendants accused of a felony. It held that the due process standards require that in cases where imprisonment is a possibility, defendants must have the assistance of a lawyer. If they cannot pay for one, the state is required to provide one at its expense.

Mapp v. Ohio [367 U.S. 643 (1961)] excluded from state trials evidence which was illegally obtained by the police. Federal courts had maintained this exclusionary rule for nearly half a century, and a number of states had created exclusionary rules of their own, but *Mapp* applied the rule to all states. At a time when crime rates were rising sharply, the decision was strongly criticized for allegedly impinging on the rights of states and opening up a huge loophole for criminal defendants.

Coming on the heels of desegregation decisions which had struck down long-established state laws (topic 10), as well as school prayer decisions striking down other state laws (topic 11), criminal law decisions such as *Gideon, Mapp,* and *Miranda* (see below) seemed to many observers part of a fundamental change in the relationship between the states and the federal government.

Questions/Strategies: Justice in Our Courts

1. Show how each of the following cases have attempted to narrow the gap between the rich defendant and the poor defendant in a criminal case: *Griffin v. Illinois* [351 U.S. 12 (1956)], the case referred to on page 95 of *Equal Justice,* in which the Court determined that indigent defendants must be given free transcripts of their trial; *Gideon v. Wainright* [372 U.S. 335 (1963)]; and *Argersinger v. Hamlin* [407 U.S. 25 (1972)], the case referred to on page 107 of *Equal Justice.*
2. Distinguish *Argersinger v. Hamlin* from *Gideon.* (*Argersinger* broadened the scope of *Gideon,* saying that "no person may be imprisoned for any offense" unless represented by counsel. *Gideon* had limited such protection to indigent defendants charged with felonies.)
3. Is there a law for the rich and a law for the poor in this country? What evidence can you offer to support your position?
4. In preparation for this discussion, have students complete the chart included in this topic to help them see the significance of these cases. Also, Encyclopedia Britannica Educational Corporation (425 N. Michigan Avenue, 10th Floor, Chicago, Illinois 60611) has produced a film on the *Gideon* case. Showing this film, which includes Clarence Earl Gideon, former Supreme Court Justice Abe Fortas and the attorney for Florida, will help to dramatize the victory of an indigent defendant. The film is designed so that teachers can stop it to conform to the case study method.
5. Discuss the significance of *Mapp v. Ohio.* Why has it created so much controversy?
6. Ask students to debate whether the criminal justice decisions of the Warren Court violated principles of federalism and diversity among states or whether they were necessary to assure justice.

Background: The Right to Remain Silent

(This discussion of the Escobedo and Miranda cases is drawn from the book *Great Trials in American History,* which was prepared by the National Institute for Citizen Education in the Law and published in 1985 by West Publishing Company. The questions following the discussion and the questions and answers appearing in the "Lesson Highlight" are drawn from the book and its teacher's guide.)

Many of the criminal procedure decisions of the Warren Court caused a storm of protest at the time and are still debated today. Some people welcomed what they saw as national standards of justice. Others opposed what they believed was an outside point of view being imposed by the federal government onto the states.

Does the U.S. Constitution require state criminal justice systems to follow certain standards for the prosecution of crimes committed in those states? As in the Scottsboro, Mapp, and Gideon cases, this was the basic issue in the Escobedo and Miranda cases.

One question left unanswered by *Gideon* was at what time a person could see his or her lawyer. When the person was officially charged with a crime? Earlier, when the person was first arrested? Or even earlier, when the person was questioned as a suspect? Also, how were people to know they had this and other rights so they could make use of them? These were the questions the Supreme Court answered in the Escobedo and Miranda cases.

Case Study: *Escobedo v. Illinois* [378 U.S. 478 (1964)]. Danny Escobedo was twenty-two years old and living in Chicago in 1960. In the early hours of January 20, he was arrested and taken to the police station for questioning about the murder of his brother-in-law, which had taken place a few hours earlier. He made no statement to police, and after about fourteen hours his lawyer obtained a release and Escobedo went home. Ten days later, however, police officers arrived at his house again and this time arrested both Escobedo and his sister, the murder victim's wife. They handcuffed Escobedo and led him out to a waiting police car. On the way to the station, one of the police officers told Escobedo that his friend Benedict DiGerlando had said that Escobedo had fired the shots that killed the victim.

"We've got a pretty tight case against you," the police officer added. "For your own good you might as well admit the crime."

"I'm sorry, but I'd like to have advice from my lawyer," Escobedo answered.

After learning of the arrest, Escobedo's lawyer went directly to the police station. There he was told by a police sergeant that his client had been taken to the homicide bureau for questioning.

"I asked Sergeant Pidgeon for permission to speak to my client," the lawyer testified later, "and he [the sergeant] told me I could not see him." Escobedo's lawyer then went directly to the homicide bureau and asked again to speak with his client. Again permission was refused. The lawyer waited for another hour or two, occasionally talking to some of the detectives and continuing to ask to speak with Escobedo. At one point, the lawyer caught a glimpse of his client through an open door and waved. Escobedo waved back and the door was closed quickly. Finally, the lawyer quoted to the police officer in charge a section of the criminal code that gives a lawyer the right to see his client. Then he left to file an official complaint with the Chicago police commissioner.

While all this was going on, Escobedo was only a suspect and had not been charged with any crime. He was questioned but he would not make any statement. Finally, the police brought DiGerlando into the room, and the two young men met face to face.

"I didn't shoot Manuel, you did it," Escobedo shouted.

Unfortunately for Escobedo, that was an admission that he participated in the crime. Escobedo did not realize that, as a party to the murder, he could be found as legally guilty as the person who pulled the trigger. After a few more hours of questioning, Escobedo said that he had paid DiGerlando $500 to shoot the victim. An assistant state attorney was brought in, and he carefully wrote down Escobedo's statement, making sure that everything was in a form that would be admissible in court.

At his trial, Danny Escobedo said the confession was untrue and that he had been tricked into making it. Escobedo claimed that the police told him that if he would sign the statement, he would be allowed to go home and would not be prosecuted. The police denied making such an offer. Escobedo's lawyer tried to have the confession thrown out of court, but the judge decided against him. The judge ruled that the confession was voluntary and would be allowed as evidence. Escobedo was convicted and sentenced to life imprisonment.

His lawyer appealed the case, but the Illinois Supreme Court upheld the orginal verdict. That court agreed with the trial judge that Escobedo's statements were voluntary. The Illinois court also felt that Escobedo was not entitled to a lawyer until he was formally accused of a crime. An appeal was then made to the U.S. Supreme Court on the grounds that Escobedo had wrongly been denied the right to counsult with his lawyer, and that he had not been informed of his right to remain silent.

Justice Arthur Goldberg wrote the majority opinion and explained the reasons for reversing the conviction of Escobedo. Justice Goldberg said Escobedo's lawyer should have been allowed to talk with him as soon as the police took Escobedo into custody as a suspect. Escobedo did not understand the legal impact of some of his statements to the police. If he had been allowed to see his lawyer, he probably would not have made those incriminating statements. In effect, Escobedo had been denied the right of counsel guaranteed by the Sixth Amendment to the U.S. Constitution, a right that was made applicable to state proceedings by the Fourteenth Amendment. Under the precedent established by the Escobedo case, a person became entitled to a lawyer when questioned by police as a suspect of a crime.

Several justices dissented. They felt that a person's right to an attorney should only begin after the prosecution formally accuses, or indicts, a defendant. They also believed that the facts showed that Escobedo's confession was voluntary.

The issues of the suspect's right to remain silent and the requirement that the suspect be told that anything he or she did say could be used as evidence in court was not ruled upon at the time. That was to come two years later, in 1966, after the Supreme Court heard the case of Ernesto Miranda.

Case Study: *Miranda v. Arizona* [384 U.S. 436 (1966)]. About a year before the Supreme Court reached the Escobedo decision, Ernesto Miranda was arrested at his home in Phoenix, Arizona, on suspicion of the kidnapping and rape of an eighteen-year-old woman. At the police station, the young woman who had made the complaint said that Miranda was indeed the person who had kidnapped and raped her.

Miranda was then taken to a room for questioning. He was not told that he was entitled to have a lawyer present during the questioning, nor was he told clearly that he had the right to remain silent and that anything he did say could be used against him in court.

Miranda realized he was in serious trouble because the police told him that the victim had identified him. Possibly for this reason, he confessed quickly. He explained his version of the crime to the police officers questioning him. A written statement was then drawn up beginning with a paragraph that stated that the confession was a voluntary one, made without threats or promises of immunity from prosecution and made with "full knowledge of my legal rights, understanding any statement I made may be used against me." Miranda signed the confession and was held for trial.

At the trial, Miranda's lawyer objected to allowing that confession to be introduced as evidence, but he was overruled. The jury found Miranda guilty of both kidnapping and rape, and he was given terms of twenty to thirty years imprisonment on each charge. The sentences were to run concurrently (at the same time) rather than one sentence after the other.

The case was then appealed to the Arizona Supreme Court on the grounds that Miranda had not been allowed to talk with a lawyer before being questioned and that during the questioning he had not been truly aware of the consequences of what he said to the police. Miranda claimed he did not realize that what he told the police could be used against him at the trial. Arizona's supreme court ruled against Miranda, noting that in the signed statement Miranda did admit he "understood" that the statement could be used against him. Furthermore, the court said, Miranda had not specifically requested a lawyer and, therefore, the police were not required to provide counsel for him.

Miranda's case reached the U.S. Supreme Court in 1966. In a majority opinion, Chief Justice Earl Warren referred to the Court's decision in the case of Danny Escobedo and pointed out its importance in providing protection for individuals against overzealous police practices. Chief Justice Warren wrote: "The constitutional issue we decide... is the admissibility of statements obtained from a defendant questioned while in custody and deprived of his freedom of action."

The case that Chief Justice Warren was writing about was certainly a difficult one. On the one hand, there was the important question of the rights of a person under the protection of the Constitution. On the other hand, there was the equally important issue of interfering with the work of the police and preventing them from arresting criminals and bringing them to trial. Members of the Supreme Court were deeply divided on how the Court should rule.

The smallest possible majority of five justices made the historic ruling: "... it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had 'full knowledge' of his 'legal rights' does not approach the knowing and intelligent waiver required to relinquish constitutional rights."

With those words, the guilty verdict against Ernesto Miranda was reversed. The majority decision spelled out the specific warnings that police must give before questioning a person in custody if they want to use the answers as evidence. The majority believed this was the best way to make sure a defendant's statements were made of his or her own free will.

Police departments throughout the country from that day forward would have to advise persons in their custody of their right to remain silent and of their right to a lawyer. If police do not give Miranda warnings, or continue their questioning after a person has expressed a desire not to talk or has requested a lawyer, no statement can be used as evidence in court.

Police failure to follow Miranda procedures does not mean that charges must be dropped and a defendant released. Other evidence besides the unconstitutionally obtained incriminating statements can still be used to convict a defendant. In addition, the arrest may still be valid.

The dissenters strongly objected to the majority's opinion. They believed that the new rules were not justified by the Constitution or by prior Supreme Court precedent. By making such rules, the Court appeared to be taking on the role of a legislature. They believed that the evils of police questioning were exaggerated. They predicted that the number of confessions would decrease. They also felt that there were other alternatives to the Miranda rules, such as having observers in police stations. Finally, they feared that many serious criminals would be set free to commit more crimes.

As a result of the Supreme Court's decisions, the names of Danny Escobedo and Ernesto Miranda became famous. The decisions did not necessarily set them free, however. This was due to the nature of the appeals process. When a court overturns a person's conviction on appeal, the person does not automatically go free. Instead, the person can be given a second trial on the original charge. In the new trial, the prosecution must follow the ruling of the court of appeals.

In Danny Escobedo's case, the Supreme Court had ruled that Escobedo's confession was obtained illegally and could not be used in court. Because the prosecution did not have enough evidence to convict him in a new trial without using his confession, the case against him was dropped, and Escobedo was set free.

The decision of the Supreme Court did not set Ernesto Miranda free, however. Even though Miranda's confession could not be used in court, the prosecution wanted a second trial. In the new trial, Miranda was convicted again, this time on evidence that Miranda admitted his guilt to another person, Mrs. Twila Hoffman. The Supreme Court's ruling did not prevent Mrs. Hoffman from testifying against Miranda because Miranda's statements to Mrs. Hoffman were voluntary and not brought about by illegal police conduct. Miranda was sentenced to twenty to thirty years in the Arizona state prison.

Questions/Strategies: The Right to Remain Silent

1. Why was Danny Escobedo arrested? What did Escobedo do and say while he was in police custody? How did this affect his trial?
2. What arguments did Escobedo's lawyer make when he appealed to the U.S. Supreme Court on Escobedo's behalf? What arguments did the state of Illinois make?
3. What did the Court decide in the Escobedo case? Why?
4. What was Ernesto Miranda accused of? What evidence did the police have, and how did they get it? What happened at his trial?
5. On what grounds did Miranda appeal to the Arizona Supreme Court? How did the Arizona Supreme Court rule on these issues?
6. How did the majority of the U.S. Supreme Court rule in the Miranda case? Why? How did the dissenters rule? Why?
7. If you had been a justice deciding the Miranda case, would you have voted with the majority or the dissenters? Explain.

LESSON HIGHLIGHT

Read to students the "Miranda" rights which must be read by police to suspected lawbreakers upon arrest: "I must tell you first you have the right to remain silent. If you choose not to remain silent, anything you say or write can and will be used as evidence against you in court. You have the right to consult a lawyer before any questioning, and you have the right to have the lawyer present with you during any questioning. You not only have the right to consult with a lawyer before any questioning, but if you lack the financial ability to retain a lawyer. a lawyer will be appointed to represent you before any questioning, and to be present with you during any questioning."

From what you know of the Miranda decision, answer the following:

- Police arrest Joe Adams for theft of a bicycle. When arrested, Adams is riding the stolen bicycle, and the police have two witnesses who saw him steal it. The police take Adams to the station, do not give him any Miranda warnings, and ask him where he got the bicycle. Adams confesses. Can the police use the confession against Adams in court? Can Adams get the case thrown out of court for lack of Miranda warnings? Explain. (The police cannot use Adam's confession against him in court because they failed to give Miranda warnings during custodial interrogation. The case against Adams can still proceed to trial, however, because there is other evidence against Adams [e.g., the two eyewitnesses and the stolen bicycle in his possession]. There is a good possibility he would be convicted.)
- The police, while investigating a murder for which they have no suspects, talk with the victim's family at their home. The police do not give the family members Miranda warnings. Can any incriminating statements made by a family member at that time be used against that person in court? (Because the police are in the investigation stage without a suspect and are not questioning anyone in custody, they do not have to give the family members Miranda warnings. In fact, police do not have to give anyone Miranda warnings unless they want to use his or her statements in court. In this example, incriminating statements made by a family member could be used in court.)
- Police ask Mr. O'Brien to come down to the station to "talk about a burglary" and O'Brien comes voluntarily. The police then tell him that he is not under arrest but that his fingerprints were found at the scene of the crime. The police do not give O'Brien Miranda warnings. He confesses. Can his confession made without warnings be used in court. (Because Mr. O'Brien is not under arrest and came to the station voluntarily, this is not a custodial interrogation and the Miranda warnings are not required. This example is based on *Oregon v. Mathiason,* 429 U.S. 492.)
- Ms. Drake, a robbery suspect in police custody, is given Miranda warnings and says she wants to remain silent. The police stop questioning and leave her alone. Two hours later and still in custody, she calls for the officer and says she changed her mind and wants to confess. After the police tell her the Miranda rights again, she confesses. Can the police use that confession in court against her? (The police can use her confession against her in court provided that they can show that she knowingly and intelligently waived her right to counsel and her right to remain silent. It is probable that the police can prove such a waiver because Ms. Drake was given the warnings twice and the police honored her right to remain silent when she invoked it the first time. Ms. Drake's confession appears to be voluntary and there is no evidence of police coercion, which is what the Miranda rules were designed to prevent.)

TOPIC

14

United States, Petitioner v. Richard M. Nixon, President of the United States (1974)

> Many decisions of this court (including this one)... have unequivocally reaffirmed the holding of *Marbury v. Madison,* that it is emphatically the province and duty of the judicial department to say what the law is.
>
> —Warren E. Burger, *U.S. v. Nixon*

Objectives

1. To understand the nature and meaning of the Watergate episode in the context of American constitutional history.
2. To appreciate the role of the Supreme Court in resolving the constitutional crisis.
3. To comprehend the meaning of the rule of law.
4. To more fully understand the concept of power.

Reading Assignment

Equal Justice Under Law, pp. 112–115.

The Watergate crisis was one of the most serious controversies in American history. All three branches of government were involved: Federal District Court Judge John Sirica heard the Watergate cases on the trial level; Attorney General Elliott Richardson was confirmed on the understanding that he would appoint a special prosecutor to hear the evidence relating to the alleged cover-up of criminal conduct; a special Senate committee looked into the matter in nationally televised hearings; the House Judiciary Committee conducted hearings on impeaching the President; and the Supreme Court was finally brought into the case to decide how far the powers of the president extended to "executive privilege." All in all, Watergate focused the attention of the American people on the nature of their government, the meaning of their Constitution, and finally on the rule of law. Would the president of the United States obey a Supreme Court ruling which ordered him to turn over tapes and papers to the special prosecutor, and thus possibly expose him to criminal prosecution and conviction?

Background

Share the following discussion of this lesson's historic case with students. It is adapted from an article by James G. Lengel and Gerald A. Danzer in the Winter, 1984, issue of *Update on Law-Related Education.* The article, in turn, was adapted from their book, *Law in American History* (Glenview, IL, Scott Foresman and Co., 1983).

The small black and white television in Potter Stewart's office was often left on all day to blare out the news and keep the office aware of what was happening in the world. Justice Stewart usually didn't pay much attention to it. Recently, though, his interest in the television was aroused. For the last several months the news was full of stories about the "Watergate" affair.

The first story told how five men were caught inside the Watergate office complex in Washington while installing hidden microphones and stealing papers from the office of the Democratic National Committee. Later the news revealed that several of the burglars worked for the "Committee to Re-Elect the President," a Republican organization with close ties to Richard M. Nixon, the president of the United States.

This news set teams of investigators to work. A special committee of the United States Senate was set up to look into the events. A special federal prosecutor was appointed (by President Nixon himself) to determine whether or not any crimes had been committed. And an excited squad of newspaper and TV reporters swarmed over Washington in search of scandal and newsworthy wrongdoing by high government officials.

Evidence accumulated quickly. The burglars were brought to trial and convicted. After their trial, one of the defendants, James McCord, revealed to trial judge John Sirica that they were acting under orders from several White House aides who were close advisers to President Nixon. Soon, several of Nixon's appointees were charged with federal crimes, including his attorney general, John Mitchell. The press called for Congress to impeach the president. Senators and members of Congress were shocked by the mounting evidence that the chief executive was directly involved in the Watergate break-in and in trying to cover up after it was discovered. Finally, the House of Representatives ordered its Judiciary Committee to investigate whether to impeach the president.

Potter Stewart wondered whether the Supreme Court would become involved in this conflict. It didn't take long for his question to be answered.

Television cameras picked up the testimony of a White House aide who explained how most of Nixon's telephone calls and office conversations were routinely tape-recorded automatically. The Senate committee was interested: Perhaps these tapes contained the evidence they needed to get to the bottom of this affair. The special prosecutor was also interested: He wanted the tapes as evidence in his trial of the Watergate conspirators. And the House Judiciary Committee thought the tapes might contain information to help them decide whether to impeach the president.

Archibald Cox, the special prosecutor (an employee of the executive branch), subpoenaed the tape recordings he wanted as evidence in the trial: he got a court order from Judge Sirica requiring Nixon to give him the tapes. The president immediately filed a motion in Sirica's federal district court to quash the subpoena. Nixon's motion was denied. So Nixon, as head of the executive branch, fired Cox.

The new special Watergate prosecutor, Leon Jaworski, pressed on with the subpoena, and asked for 64 additional tapes. The president refused to surrender the tapes and fought the subpoena in court. By a special procedure the case was immediately appealed to the U.S. Supreme Court. Potter Stewart and his colleagues would finally have their chance to render a judgment.

On July 8, 1974, the case of *United States v. Nixon, President of the United States* [418 U.S. 683 (1974)], was called for oral arguments. The spectators' gallery was full. No television cameras were allowed inside the courtroom.

Leon Jaworski, representing the United States Department of Justice, spoke first. He explained how he needed the tapes to prosecute the Watergate conspirators and how the federal court had the constitutional authority to order the president to release them for evidence.

James St. Clair, the president's lawyer, then argued his side of the case. He claimed the Court had no authority in the case because the special prosecutor was an employee of the executive branch of government; therefore, any dispute between him and the president should be settled within the executive branch. St. Clair also argued that the Court could not tell the president how to carry out his constitutional duties, that the president has an "executive privilege" to conduct his business without harassment or review by the judiciary branch. If the courts intruded into the president's private conversations and phone calls, the whole balance of powers in the federal government would be destroyed.

Jaworski, in his final argument, summed up the question before the Court:

> . . .this case really presents one fundamental issue. Who is to be the arbiter of what the Constitution says?. . .Now the President may be right in how he reads the Constitution. But he may also be wrong. And if he is wrong, who is there to tell him so?. . .This nation's constitutional form of government is in serious jeopardy if the President, any president, is to say that the Constitution says what *he* says it does, and that there is no one, not even the Supreme Court, to tell him otherwise.

The president had interpreted the Constitution to say that he had an executive privilege to withold private

documents and tape recordings as he saw fit. The special prosecutor argued that Supreme Court had the ultimate authority to interpret the Constitution. Who was right? And what if the president ignored the Court's final decision? Is the president above the law?

Just 16 days after oral arguments, the Supreme Court made its decision. There were three main issues in the case, and the Court answered each in its opinion. Issue 1: Was this a matter the Court could decide, or was it simply a dispute within the executive branch that the Court had no right to interfere with? In legal jargon, was this a *justiciable* case?

The High Court held that it was.

> Here at issue is the production or non-production of specified evidence. . . relevant and admissible in a pending criminal case. It is sought by one official of the Executive Branch within the scope of his express authority; it is resisted by the Chief Executive on the ground of his duty to preserve the confidentiality of the communications of the President. . . . These issues are of a type which are traditionally justiciable. . . .
>
> The independent special prosecutor. . . is opposed by the President. . . . This setting assures that there is "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions". . . . It is within the traditional scope of Article III power. . . . [Thus] the fact that both parties are officers of the executive branch cannot be viewed as a barrier to justiciability. . . .

Having ruled that the judicial branch had the power to hear this case, the Court decided Issue 2: Was the special prosecutor's subpeona legal? Were these tapes really necessary for trial of the Watergate conspirators? Or was the subpoena simply a "fishing expedition," designed to publicize material damaging to the president?

In federal courts, a subpeona can only be issued if it meets certain standards. Simplifed greatly, these standards are that the evidence sought must be relevant to the case being tried; the materials requested must be impossible to obtain in any other way; and the subpeona must specifically state the exact material being requested. The Supreme Court used these rules to decide whether or not Jaworski's request was legal.

The Court realized the sensitivity of this particular case: "In such a case as this. . . where a subpoena is directed to a President of the United States, [we must] in deference to a coordinate branch of government, be particularly meticulous to ensure that the standards. . . have been correctly applied." But they decided in favor of the prosecutor: "We conclude. . . that the special prosecutor has made a sufficient showing to justify a subpoena. . . that at least part of the conversations relate to the offenses charged in the indictment."

The subpoena was legal and proper, but did the president have to obey it? This was Issue 3, the third and biggest question. Does the president have an "executive privilege" to protect his private conversations from judicial review?

First, the Court explained that the president did enjoy a measure of confidentiality in his executive business:

> Nowhere in the Constitution. . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest is related to the effective discharge of a president's powers, it is constitutionally based.
>
> The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.

But, said the Court, the privilege of the president is *not* absolute:

> But this presumptive privilege must be considered in light of our historic commitment to the rule of law. . . . The allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. . . . [Executive privilege] cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. . . neither the doctrine of separation of powers, nor the need for confidentiality. . . can sustain an absolute unqualified Presidential privilege of immunity from judicial process under all circumstances.

The president, like every other citizen, is subject to the rule of law. Any other reasoning, said the Court, "would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Article III."

Finally, the eight justices (Justice Rehnquist, a recent Nixon appointee, excused himself from this case) explained which branch had the authority to be the final arbiter of the Constitution:

> In the performance of assigned constitutional duties each branch of government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President. . . reads the Constitution as providing an absolute privilege of confidentiality for all presidential communications. Many decisions of this court (including this one), however, have unequivocally reaffirmed the holding of *Marbury v. Madison,* that "it is emphatically the province and duty of the judicial department to say what the law is."

The television news announced the decision: by unanimous vote the Supreme Court ordered Nixon to surrender the Watergate tapes. The president obeyed the law. The tapes were released. The nature of Nixon's conversations on the tapes led the House Judiciary Committee to bring articles of impeachment against the president. Richard M. Nixon resigned the office of president of the United States on August 9, 1974.

The Watergate affair tested many aspects of the Constitution, but it most clearly tested the impeachment procedure. After the president resigned, the presidential succession clauses were tried out for the first time. And with the case of *United States v. Nixon,* the principle of separation of powers came up for review.

These tests came suddenly, in an atmosphere of crisis, and demanded quick action. People wondered in 1974 whether or not the Constitution and the rule of law would prevail, whether 200-year-old principles and phrases were sufficient to solve modern problems.

Throughout the Watergate events, the Constitution itself was not questioned. Both sides in *United States v. Nixon* quoted the document in support of their arguments. The president thought the Constitution was on his side; the special prosecutor thought likewise.

The essential disagreement came over which branch of the federal government had the authority to decide what the Constitution really means. The president thought that he, through the law enforcement and general executive powers granted to him by Article II, had the authority to decide what's proper in prosecuting a federal crime. The Supreme Court thought that it, and only it, had the authority to decide whether or not the president's interpretation was the right one.

The Court exercised this interpretive power throughout the 19th and 20th centuries, and in the Watergate case had a chance to reaffirm its position. The United States Supreme Court emerged as the final arbiter of the law, as the keeper of the true meaning of the Constitution.

Questions/Strategies

1. The wealth of historical and constitutional drama in this topic calls for an unusual approach. A moot court could be built around the facts, issues, opposing arguments, decision, and opinions. This arrangement would involve nine justices and four lawyers on each side. The remainder of the class could take the role of journalists or television commentators, writing up the proceedings for their papers or stations. Since a moot court is not a trial but an appellate proceeding, each side is a limited in the time it has to present its case and to rebut the arguments of the opposing side. Justices should be free to question the lawyers, as they do in cases before the Supreme Court. (Many books and articles would assist in this exercise. One of the most useful is *Milestones! 200 Years of American Law: Milestones in Our Legal History* by Jethro K. Lieberman, West Publishing Co., 1976. See pp. 371–395.)
2. This subject may also be approached through student or committee reports on the following topics:
   - The Plumbers
   - The Tapes
   - The "Saturday Night Massacre"
   - Judge Sirica and the Watergate Trials
   - Leon Jaworski as Special Prosecutor
   - Chief Justice Burger's Unanimous Opinion
   - The Impeachment Proceedings against the President
3. A third approach to this lesson uses the Socratic Dialogue, based on the following questions: Why was Watergate referred to as a constitutional crisis? Why was there world wide interest in this drama? What were the precedents and arguments for and against the claim of presidential/executive privilege in the surrender of the White House tapes?
4. What connection is there between *Marbury v. Madison,* Burr's treason trial, and *United States v. Nixon*?

LESSON HIGHLIGHT

Two *Washington Post* reporters—Bob Woodward and Carl Bernstein—were famous for their "deep throat" contact and their reports on the Watergate saga. In part because of the massive news coverage given Watergate, some observers continually challenged the media as being biased and inaccurate in their reports. Have students research some of the news reports on Watergate and analyze them in terms of their objectivity, accuracy, and even-handedness. For those reports students find wanting, have them rewrite the stories to correct the slanted or incomplete coverage.

TOPIC

15

Constitutional Issues of the 1980s

Our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form.

– Franklin D. Roosevelt, First Inaugural Address, 1933

Objectives

1. To explore recent rulings of the Court which have implications for the immediate future.
2. To try to discern new issues which have their roots in constitutional provisions.

Reading Assignment

Equal Ju: .e Under Law, pp. 115–120.

This topic highlights several controversial issues that could appear on the Supreme Court's docket in the near future: capital punishment, abortion, and reverse discrimination.

Background: Capital Punishment

(This discussion is based on several articles in *Update on Law-Related Education.*)

While *Furman v. Georgia* [408 U.S. 238 (1972)] may not be a familiar case to most Americans, it became one of the more controversial of recent rulings for its holding that the death penalty as applied in many instances constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. (The Eighth Amendment applies to the federal government; its prohibition of cruel and unusual punishment applies to the states through the Fourteenth Amendment.) In that case, the Court's majority held that the Georgia death penalty statute, which gave jurors unguided discretion to impose the death sentence, had resulted in the "wanton" and "freakish" imposition of the penalty.

Many people do not realize, however, that the case did not outlaw capital punishment *per se.* Only Marshall and Brennan, two of the five justices in the majority, argued that the Eighth Amendment prohibits the death penalty under all circumstances. The other members of the majority, Justices Douglas, Stewart, and

White, seemed more concerned that its imposition violated equal protection principles – that the states had employed it randomly and all too often against poor and minority defendants. The dissenting justices, each of whom wrote separate opinions, argued that the death penalty was not contrary to the Constitution, whatever their personal views on its morality and effectiveness.

As *Equal Justice* points out (pp. 115–116), in the years following *Furman,* 35 states changed their death penalty statutes in an attempt to make them constitutional. In *Woodson v. North Carolina* [428 U.S. 280 (1976)], the Court struck down one common approach: making the death penalty mandatory for certain crimes. A plurality of the Court held that to make the penalty mandatory "simply papered over the problem of unguided and unchecked jury discretion."

In *Gregg v. Georgia* [428 U.S. 153 (1976)], the Court approved another approach by a 7-to-2 majority. According to a 1983 article in the *Washington Post,* the laws in question provided for "guided discretion" in capital sentencing. Factors of aggravation and mitigation would be considered in special sentencing hearings and later reviewed by higher courts to safeguard against prejudice.

"It is an extreme sanction, suitable to the most extreme of crimes," said the majority opinion. "The concerns expressed in the 1972 decision can be met by a carefully drafted statute that focuses the jury's attention on the particularized nature of the crime and . . . individual defendant . . . . In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence."

Concurring, Justices White and Rehnquist and Chief Justice Burger admonished opponents of the penalty for arguing "that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law." The penalty is constitutional, they said, even though "mistakes will be made and discrimination will occur."

Questions/Strategies: Capital Punishment

1. Do you favor or oppose capital punishment? Support your position. (It is important that the Eighth and Fourteenth Amendments – including the Due Process Clause and the Equal Protection Clause – be central to the discussion.)
2. Using the summaries above as a guide, differentiate the Court's decision in *Furman v. Georgia* (1972) from that in *Gregg v. Georgia* (1976).
3. Conduct a community survey on capital punishment. Questions could include:
   - Do you favor or oppose capital punishment?
   - Do you think capital punishment is a deterrent to crime?
   - Do you think that the imposition of capital punishment ever results in the execution of an innocent person?
   - Do you think that capital punishment is applied equally regardless of race, creed, or color?
   - Do you think that capital punishment should be mandatory for certain crimes? If so, which crimes?

   Have students include their own questions in the survey.
4. Underlying the discussion of capital punishment is an allegedly unequal application of the law. Opponents assert that blacks are overwhelmingly overrepresented on death row and question whether these laws may have been used in a discriminatory fashion. The enforcement of capital punishment laws obviously touches on the theme of equal justice, which courses through this book. Have students find out the number of death row inmates in your state, their crimes, and their race, creed, etc. Then discuss the concept of equal application of the law as it applies to the death penalty.

Background: Abortion

(The discussion in this section is drawn from *Rights of Privacy,* edited by John H. F. Shattuck, Skokie, IL: National Textbook Company, 1977.)

It is important for students to understand the justices' reasoning in *Roe v. Wade,* the 1973 decision declaring that state laws against abortion violate the Constitution. That, in turn, requires an understanding of an earlier case, *Griswold v. Connecticut* [381 U.S. 479 (1965)]. In that case, the director of Planned Parenthood in Connecticut and a professor at Yale Medical School provided married couples with information on how to best prevent conception. They were charged with violating a state law against recommending contraceptives.

When the case got to the Supreme Court, the justices struck down the Connecticut law and established a new right to marital privacy. Speaking for the majority, Justice Douglas wrote,

This law...operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.... [The] specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.... Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one.... The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"....

We deal with a right of privacy older than the Bill of Rights.... Marriage is a coming together ...intimate to the degree of being sacred.... It is an association for as noble a purpose as any involved in our prior decisions....

Accordingly, the Connecticut law unlawfully invades constitutionally protected zones of privacy, even though the word "privacy" appears nowhere in the Constitution and there is no explicit guarantee of privacy.

The decision is the source of a new constitutional right of "privacy," related to but separate from the privacy interests in the First and Fourth Amendments. It is this right which is important to *Roe v. Wade.*

Since the mid-nineteenth century most states had made it a crime to obtain or perform an abortion except to save the life of the mother. With the advent of the sexual revolution and the women's movement during the 1960's, these anti-abortion statutes came increasingly under attack both in the political arena and in the courts.

In March 1970, Jane Roe, an unmarried, pregnant woman, filed suit anonymously against the district attorney of Dallas County, Texas, seeking a declaratory judgment that the Texas criminal abortion statute, enacted in 1854, was unconstitutional on its face and could not be used to prevent her from obtaining an abortion.

Three years later, in *Roe v. Wade* [410 U.S. 113], the U.S. Supreme Court struck down the Texas law. Justice Blackmun delivered the opinion of the Court.

The Constitution does not explicitly mention any right of privacy.... However, the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have indeed found at least the roots of that right in the First Amendment...in the Fourth and Fifth Amendments...in the penumbras of the Bill of Rights...in the Ninth Amendment...or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.... These decisions make it clear that only personal rights that can be deemed "fundamental"...are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage... procreation... contraception...family relationships and child rearing and education....

This right of privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent.... All these are factors the woman and her responsible physician necessarily will consider in consultation.

Justice Blackmun's opinion held, however, that the right to an abortion is not absolute.

On the basis of elements such as these, [Jane Roe] and some amici [friends of the court] argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree.

[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision....

Blackmun's majority opinion also rejected another absolutist argument, that of the state, which asserted that the fetus is legally a person and thus his/her life is fully protected.

The [state of Texas] and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, [Jane Roe's] case, of course, collapses...

The Constitution does not define "person" in so many words.... But in nearly all...instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application.

Justice Blackmun's decision weighed the conflicting positions and determined that each is more or less compelling depending on the stage of pregnancy.

The period of pregnancy can be divided into three-month periods—trimesters. During the first period there is no agreement as to the fetus being a person, so the discretion rests with the woman and her physician. During the second and third trimesters, agreement increases as to the fetus becoming a "person," and the interest of the state increases accordingly, along with its power to restrict the discretion of the woman. During the final trimester the state many even forbid abortions, except when necessary to preserve the life or health of the mother.

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability [*i.e.*, the ability of the fetus to survive outside the womb, generally held to begin six months after conception]. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.

Justice White dissented, in a decision joined by Justice Rehnquist. White argued that the Court was invading the appropriate prerogatives of legislatures:

> The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries.
>
> ....I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States.... This issue...should be left to the people and the political processes....

Some commentators, noting some of the language in the majority opinion and in the concurring opinions, have concluded that the decision restores the concept of substantive due process to the Fourteenth Amendment. That concept was broached many years ago by the Court in very different contexts, such as the early social regulation invalidated in *Lochner v. New York* [198 U.S. 45 (1905)] (See *Equal Justice,* pages 62–63, 70–71). Under the notion of substantive due process, certain state regulations unconstitutionally invade the "liberty of contract" which the Court held to be protected by the Fourteenth Amendment's Due Process Clause. Thus, in *Lochner,* the Court held that a New York law restricting the amount of hours employees may work each week in bakeries unconstitutionally deprived both employees and employers of their right to contract. In a famous dissent in that case, Justice Holmes wrote that the Court was reading a particular economic theory into the Constitution. He said that laws might rest on "novel and even shocking ideas" and still be constitutional.

In a speech in 1974, one year after *Roe,* Justice Rehnquist, one of the dissenters in that case, suggested that the right of privacy advanced in *Griswold* and *Roe* is "quite a different right from the traditional Fourth Amendment concept of privacy. For here the constitutional ban is not upon governmental intrusion...into a private dwelling house; it is a ban on legislative regulation of an entire area of conduct...." As such, it is suspiciously like the concept advanced in *Lochner,* which, as Rehnquist pointed out "is not the law today and has not been the law for many years," since later courts have recognized that the Due Process Clause of the Fourteenth Amendment "had not been designed to prevent popularly elected legislatures from regulating business activities."

Questions/Strategies: Abortion

1. Summarize the Court's abortion decision in *Roe v. Wade.* Explain how you stand on this important ruling. What rights should the male partner have?
2. Discuss the constitutional rationale for this decision. Point out to students that privacy is not explicitly guaranteed anywhere in the Constitution. Is the abortion decision an example of strict or loose interpretation of the Constitution? Go back to discussions of the Marshall Court (topics 3 and 4) and the New Deal Court (topic 8) for other debates over strict and loose construction.
3. Should parental consent for a pregnant minor be required? Should the physician be required to notify the parents of a pregnant minor before performing an abortion? What consent, if any, should be required of the male partner of the pregnant minor?
4. Should federal funds for abortions be available to indigent women? When the Court refused to strike down state laws which permitted Medicaid benefits for pregnancy but not for abortion, the justices divided sharply over whether this violated the Equal Protection Clause of the Fourteenth Amendment. Have students discuss this issue and see whether the Constitution has been violated.

Background: Discrimination and Reverse Discrimination

Efforts to redress generations of discrimination against minorities have included "numerical goals," "quotas,"

and preferential policies designed to increase the number of minority persons attending certain colleges, working in certain industries, etc. Some of these plans have been developed by private institutions. Others have been developed by public agencies. Some statutes have written certain preferential policies into law. These various efforts have aroused much controversy and have led to a number of important Supreme Court cases, summarized here from *Update on Law-Related Education.*

In the celebrated case of *Bakke v. Regents of the University of California* [438 U.S. 265 (1978)], the Court considered a preferential admission challenge to a public university, but divided in such a way as to leave many issues unsettled. The program in question guaranteed 16 places out of a medical school class of 100 to minorities. Allan Bakke, a white man, was twice denied entry to the medical school at the University of California at Davis. During each year that he applied, most of his test scores exceeded those of regular admittees, and they far exceeded the scores of 16 minority students entering under the special admissions program. Bakke sued, contending that he was denied admission of the basis of race, in violation of Title VI of the 1964 Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment.

Four justices felt such a preference violated the nondiscrimination provisions of the 1964 Civil Rights Act, so they did not reach the constitutional question. Basing their reasoning on a section of the 1964 act—"No person of the United States shall, on the ground of race, color, or national origin, be excluded from participation in...any program or activity receiving Federal financial assistance"—they would declare that the preferential policy was unlawful and thus would agree with Bakke that he should be admitted.

Four other justices felt the program was consistent both with the Constitution and with the federal laws. Noting that such explicit racial classifications required the state to show that it had "compelling" reasons for acting as it did, they held that the goal of eradicating past discrimination was sufficient to meet this test. They would uphold the preferential policy and deny Bakke's plea.

Because of this split, Justice Powell (who held neither of these positions) became the critical vote. He based his opinion not on the Civil Rights Act of 1964 but on the Equal Protection Clause of the Fourteenth Amendment. In his view the particular program was unlawful because it favored minorities on racial grounds without a legislative or administrative judgement that past racial discrimination needed to be overcome by such positive action. His opinion emphasized that courts will give strict scrutiny to *any* racial classification, even one ostensibly designed to remedy past discrimination. However, unlike the four justices who applied this test and found that the state showed that it had "compelling" reasons for acting as it did, Powell held that California could not pass this test in the Bakke case. "When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect. The Davis admissions program of explicit racial classification has never been countenanced by this court." (See discussion of equal protection standards in topic 10 and discussion of the *Korematsu* case in topic 9.)

But Justice Powell went on to indicate that other types of preferential programs—especially those that sought to promote "diversity" in the student body—would probably get his vote. He held that the California Supreme Court erred in holding that race can never be considered in evaluating an applicant: the state "has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive considerations of race and ethnic origin."

After the Bakke decision, many colleges and universities did give greater weight to diversity as a goal of minority admission and financial aid programs. In fact there have been remarkably few legal challenges to such programs since *Bakke,* and the Supreme Court has had no occasion to speak further to these issues.

A year later, though, the Court did address a related question. A labor agreement at a Louisiana steel mill provided special advancement opportunities for minority workers, and a white employee who had been excluded from the program brought suit. In *United Steelworkers of America v. Weber* [443 U.S. 193], the Supreme Court upheld the program under federal civil rights laws; there was no constitutional issue here since the Equal Protection Clause does not apply to hiring policies of private companies, the Court held.

The majority felt that an employer and union might jointly develop programs to eliminate the vestiges of past discrimination and segregation. In the plant, for example, blacks held a substantially smaller percentage of the craft and skilled jobs than their percentage of the population in the surrounding community. Although the Court had earlier held that federal civil right laws protected white as well as minority persons, neither did they prevent employer and union from entering an agreement to expand opportunities for historically disadvantaged minorities. That was all the parties had done here, so the Court had no need to define the outer limits of these laws.

In a 6-3 decision in *Fullilove v. Klutznick* [448 U.S. 448 (1980)], the Court upheld the 1977 Public Works Act, which specified that 10% of the $4 billion in available funds be given to minority contractors. Minority business enterprises were defined as companies in which Blacks, Hispanic-Americans, Oriental-Americans, American Indians, Eskimos or Aleuts had at least a 50% interest.

The "set aside" provision was challenged in a number of lawsuits by trade associations representing nonminority construction companies around the country. Their contention was that the program constituted an unconstitutional preference based on race.

At issue were the limits of Congress in legislating remedial procedures where there has been documented, historical racial discrimination against certain groups. Chief Justice Burger, in an opinion joined by Justices Byron White and Lewis Powell, intimated that Congress had (1) reason to conclude that minority contractors had suffered from discrimination and (2) the constitutional authority to remedy the problem.

Burger said, "We reject the contention that in a remedial context Congress must act in a wholly color-blind fashion. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress." A concurring opinion was written by Justice Thurgood Marshall and joined by Justices Harry Blackmun and William Brennan.

In one of two dissents, Justice Potter Stewart, joined by Justice William Rehnquist, stated, "It took many decades after the adoption of the Fourteenth Amendment before the states and federal government were finally directed to eliminate detrimental classifications based on race. Today the Court derails this achievement and places its imprimatur on the creation once again by government of privilege based on birth."

Questions/Strategies: Discrimination and Reverse Discrimination

1. Summarize the Supreme Court decisions from 1971-1976 dealing with state and local remedies designed to desegregate education. (See *Equal Justice,* pages 118-119.) With which do you agree and with which do you disagree? Why?
2. Legislation and policies which aimed to undo racial injustices of the past were criticized as establishing reverse discrimination. The case of *Regents of the University of California v. Bakke* became the focal point of national attention. What is meant by reverse discrimination? If you were pleading the case for the university, what would be your most effective arguments? If you were presenting Bakke's position, how would you phrase your arguments? Summarize the Court's 5-4 decision.
3. Reconcile the Court's rulings in *Bakke* with the affirmative action program established in *Weber* and with the federal law that set aside ten percent of local public works programs for minority businesses in *Fullilove.*
4. As noted in topic 5, in the civil rights cases of 1883, the majority complained that blacks had a favored position under the law which their former condition of servitude no longer merited. Note Justice Stewart's dissent in *Fullilove* and ask students to discuss whether explicit distinctions based on race can ever be justified under our Constitution.

LESSON HIGHLIGHT

Conclude this topic with a brainstorming session on constitutional issues which will confront the Court in the 1980s and 1990s. The text enumerates the following problems for the future:

- the changing nature of the family
- freedom of information laws
- the right to privacy (shades of Orwell's *1984*)
- test-tube babies and surrogate mothers
- palimony
- rights of the handicapped, elderly and minors
- preferential treatment of minorities

TOPIC

16

Supreme Court Milestones and Structure, Composition, and Functions of the Federal Judiciary

Objectives

1. To develop a knowledge and understanding of the federal judiciary.
2. To develop skill in using the text and the index to answer questions concerning the federal judiciary.
3. To try to reach at a consensus on the Supreme Court rulings which have had a lasting impact on the lives of Americans.
4. To consider citicisms of the Court and to weigh proposals for change.

Reading Assignment

Equal Justice Under Law, pp. 123-157.

These pages contain a great deal of useful material relating to the nature of the federal judiciary in general, and to the work of the Supreme Court in particular. Changing the pace now in our use of *Equal Justice* could add variety and encourage individual study of the material. The following questionnaire or examination is designed to motivate readers to find the answers to a number of questions. Instructors should feel free to add their own questions and to delete those they have already covered.

Questions

1. Who appoints the chief justice of the United States? The associate justices of the Supreme Court? All other federal judges?
2. Which governmental body has to confirm these appointments?
3. What vote is necessary for confirmation?
4. What is the term of office of the chief justice of the United States, associate justices, and all other federal judges?
5. On what grounds may a federal judge may be removed?
6. Describe the two-fold process used to remove a judge.
7. Who approves the budget of the federal courts?
8. During our history, how many justices have sat on the Supreme Court?
9. During our history, how many chief justices of the United States have we had?

10. How many women have been appointed to the Supreme Court?
11. Identify the present chief justice of the United States.
12. Identify four other justices sitting on the Court.
13. When does the annual term of the Court begin? When does it end?
14. Over which types of cases does the Supreme Court have original jurisdiction (act as a trial court)?
15. Describe the types of cases that come up before the Court on appeal.
16. Many of the cases reaching the Court on appeal are *in forma pauperis*. What does this mean? What does it tell you about the Court?
17. Describe the procedure followed in the arrangement of the seating of the nine justices of the Supreme Court.
18. Why do the justices meet in private to discuss the issues of the cases before them?
19. What procedure do the justices follow when they begin discussing the merits of a case? Why do they follow this procedure?
20. How many of the nine justices must agree on whether they will accept a case for review? Why is this important?
21. In assigning the writing of opinions, what procedure is followed?
22. How many judicial circuits are there? In which circuit do you live?
23. Why are Supreme Court justices assigned to circuits?
24. State five duties of the chief justice of the United States.
25. Differentiate the jurisdictions of the federal district courts, the U.S. Court of Claims, the U.S. Court of International Trade, and the U.S. courts of appeal.
26. What is the United States Judicial Conference? Why is it often described as the "board of directors" of the federal judiciary?

Background: Legal Landmarks

Review *Equal Justice Under Law*, your notes, and any materials which relate to important decisions of the Court.

In 1974, while preparing to celebrate the Bicentennial of the Declaration of Independence, West Publishing Company polled members of the American Bar Association (judges, lawyers, law professors, and others) on what milestones in our legal history should be included in a soon-to-be-published book. The Declaration of Independence and the Constitution were such obvious milestones that they were not included. The eighteen which received the highest number of votes were:

1. *Marbury v. Madison*
2. Warren and the Warren Court
3. *U.S. v. Richard Nixon*
4. Miranda case
5. *Brown v. Board of Education*
6. Dred Scott decision
7. Social Security Act
8. Dartmouth College case
9. *In Re Gault*
10. Schechter Poultry case
11. *Baker v. Carr*
12. Marshall and Marshall Court
13. *Gideon v. Wainwright*
14. Fourteenth Amendment
15. *Erie v. Tomkins*
16. *Mapp v. Ohio*
17. *McCulloch v. Maryland*
18. *Roe v. Wade*

Milestones! 200 Years of American Law: Milestones in Our Legal History, produced after the poll, discusses these landmarks of legal history.

Strategies: Legal Landmarks

The "top-ten" theme can be used here. Ask students to complete their own lists and be prepared to explain their choices. Another approach is to have each member of the class prepare a list of five milestones in Supreme Court history, with a set of criteria which determined the selection. These cases and criteria could be collated before class discussion, when students can react to each list and try to agree on a "top ten." A third approach is to distribute a copy of *Milestones!* and have students report on cases using the case study method.

Background: Criticism of the Court

Read pp. 65, 104 and 105 of *Equal Justice*. It is inevitable that an institution as powerful as the Supreme Court of the United States will attract criticism from those who do not agree with its rulings. Presidents, congressmen, the media, and private and professional organizations have attacked the Court and have offered the proposals to curb its power and use of judicial review.

Questions/Strategies: Criticism of the Court

1. Summarize why each of the following presidents of the United States criticized the Court: Jefferson, Jackson, Lincoln, and Franklin D. Roosevelt.
2. Supplement the textbook material with reports by students or committees. During the course of the discussion, pose this question: Why do strong presidents seem to run into more problems with the Supreme Court than others?
3. If you were a member of Congress, under what circumstances might you challenge Supreme Court rulings?
4. Why has the Court been criticized for its decisions in the following areas?
   - abortion
   - desegregation in the schools
   - affirmative action (reverse discrimination)
   - reapportionment
   - prayer in public schools
   - aid to parochial schools
   - rights of the accused
   - exclusionary rule
5. Some justices have been accused of being "judicial activists" who transform the Court into a super-legislature through judicial legislation. Other justices have been criticized for belonging to the school of "judicial restraint"—so bound to precedents of the past that they immobilize the Court from facing the challenges of the present and the future. Explain the reasons and bases for these criticisms and indicate what, in your judgment, ought to be the role of the Court now and in the years ahead.
6. Indicate what you think about each of the following suggestions that have been made to change the present power of the Supreme Court:
   - Congressional action to limit the jurisdiction of the Court (limit the types of cases which it can accept)
   - Require at least a 6-to-3 vote to declare a law of Congress unconstitutional
   - Give Congress power to overrule a Court ruling by a two-thirds vote
   - Elect justices for a limited term
7. Why is it that these proposals to alter the power and procedures of the Supreme Court have not been adopted?

LESSON HIGHLIGHT

1. Review relevant passages of *Equal Justice Under Law,* notes taken while studying the book, and other materials which might be useful, such as books on the justices and the Supreme Court.

   The top ten batters, the top ten pitchers, the top ten books, the top ten quarterbacks, the top ten tunes—choosing "the best" is a great American sport. Why should the justices be exempt?

   "The All-Time, All-Star, All-Era Supreme Court," an article written by James E. Hambleton, Director of the Texas State Law Library, appeared in the *American Bar Association Journal,* Vol. 69, pp. 462–64, April, 1983. Hambleton synthesizes four earlier lists of the best judges in the country—including some state judges—to come up with the "the best" Supreme Court justices. Using baseball players' postions, he presents us with this lineup:
   - Oliver Wendell Holmes Jr., c
   - John Marshall, p
   - Joseph Story, 1b
   - Benjamin N. Cardozo, 2b
   - Charles Evans Hughes, ss
   - Hugo Black, 3b
   - Earl Warren, lf
   - Louis D. Brandeis, cf
   - Roger B. Taney, rf

   In his article, Hambleton refers to the criteria used by George Currie of the Wisconsin Supreme Court in choosing his nine candidates: over-all ability, prophetic vision, and judicial statesmanship. These three are amplified as follows:

   > Ability is defined by Currie as proficiency in the law, the power of persuasion, the power to reason logically and write well, and the capacity to "rise above prior political or economic views to decide an issue objectively." Prophetic vision enables a judge to discern the impact of a decision both on future legal development and on the social order. Judicial statesmanship includes the power to draft an opinion dictated by prophetic vision but placed on the proper legal and constitutional grounds. The enduring character of a judge's legal contributions was counted as proof that a particular judge possessed these qualities.

   Criteria used by other compilers are judicial activism (using judicial power to meet the challenges of the time), willingness to use the full power of the bench to confront crucial issues, long service on the bench, and service during "creative" periods in American law and American history.

2. On the basis of your reading and our discussions up to this point, which justices of the Supreme Court would you select as the top ten (place names on board)?
3. Now that we have listed our favorites, tell us what criteria you used in selecting your justice.
4. Have students present their criteria and then have them apply the criteria to the justices who have been listed. Students, of course, will answer this question in their language, but their contributions will correspond in some way to those of the writers summarized above.
5. At this point, unveil Hambleton's All-Star line-up. Of course, there are only nine justices in his list. To come up with the tenth, we can use some of the "utility" players who have made their mark on the judicial scoreboard: John M. Harlan, Harlan F. Stone, Felix Frankfurter, Samuel Freeman Miller, William Johnson, Joseph P. Bradley, and William O. Douglas. The latter is the only one who does not appear on any of the lists mentioned in the Hambleton article.

APPENDIX A

Glossary

(This glossary is an amalgam of the definitions offered in the glossaries of a number of source books. We relied primarily on definitions given in Bruce A. Newman's and Richard J. Drew's *American Law Source Book for the Classroom Teacher,* published in 1981 by the Young Lawyers Division of the ABA, and *Law and the Courts*, published in 1980 by the ABA. We supplemented these books with definitions from the glossaries of Isidore Starr's *The Idea of Liberty* and *The Idea of Justice,* published in 1978 and 1981, respectively, by West Publishing Company, and the National Institute on Citizen Education in the Law's *Great Trials in American History,* published in 1985 by West Publishing Company.)

We haven't attempted a full listing of legal terms, but rather have concentrated on those which pertain to appellate practice (and especially the U.S. Supreme Court) and to the controversies covered in *Equal Justice* and this guide. As with all the materials presented in this book, there is much room for disagreement over the meaning of some words and phrases. For a fuller look at legal terminolgy, consult the mammoth *Black's Law Dictionary.*

Action. Lawsuit; the legal demand for one's right asserted in a court.

Adversary System. The trial methods used in the U.S. and some other countries, based on the belief that truth can best be determined by giving opposing parties full opportunity to present and establish their evidence, and to test by cross-examination the evidence presented by their adversaries, under established rules of procedure before an impartial judge and/or jury.

Advisory Opinion. A judicial opinion on a specific issue, not in reference to any particular lawsuit; ever since it turned down a request for an advisory opinion from George Washington, the Supreme Court has never issued such opinions.

Affirmative Action. The requirement that an organization take steps to make up for past discrimination in hiring, promotion, or admittance; for example, by accepting more minorities and women; see also **Reverse Discrimination.**

Amicus Curiae. Latin, a "friend of the court;" one not involved as a party to a lawsuit who intervenes and volunteers information to clarify a point of law and help decide a case.

Appeal. To ask a higher court to review actions of a lower court in order to correct mistakes or injustices.

Appellate Court. A court which hears appeals and reviews lower court decisions, generally on the lower court record only.

Appellant. The party appealing a decision or judgment to a higher court.

Appellee. The successful party in the lower court against whom an appeal is taken.

Beyond a Reasonable Doubt. The level of proof required to convict a defendant in a criminal case. A jury must be convinced to the utmost certainty by the evidence that the person is guilty.

Brief. A written argument prepared by counsel to file in court that sets forth both facts and law in support of a case.

Burden of Proof. The duty to establish a fact or facts in dispute, i.e., the plaintiff in a personal injury lawsuit has the burden of proving that an injury occurred, and that the defendant caused it. The state has the burden of proof in criminal cases. (See **Beyond a Reasonable Doubt.**)

Capital Offense. A crime for which the death penalty can be imposed.

Capital Punishment. The death penalty.

Certiorari. (Latin) "To make sure." A request for certiorari is an appeal which the higher court is not required to grant. If it does, then it agrees to hear the case, and a writ of certiorari is issued commanding officials of inferior courts to convey the record of the case to the higher court.

Civil Actions or Suits. Generally, noncriminal cases concerning the claim of one private individual against another.

Commerce Clause. Constitutional clause that permits federal regulation of interstate commerce (Article I, section 8, cl. 3).

Commission. A formal written warrant granting the power to perform various acts and duties; an appointment.

Common Law. The term generally refers to the "judge-made law" (case law or decision law). The common law originated in England in the rulings of judges based on tradition and custom. These rulings became the law common to the land. Common law is distinguished from statutes (laws enacted by legislatures).

Concurrence. Agreement with an opinion.

Contract. An exchange of oral or written promises between two or more parties to do or not do a particular thing, enforceable by law.

Court Martial. A military court of commissioned officers (and sometimes enlisted personnel) that tries members of the armed forces.

Decree. A court decision or order. A final decree fully and finally disposes of a case; an interlocutory decree is preliminary in nature, determining some issue in the case but not the ultimate question involved.

Deposition. A witness' testimony given elsewhere than in open court, recorded and sworn to for use at a trial.

Discrimination. The unequal treatment of a person or persons on a basis other than individual merit. Discrimination can be illegal when based on a person's race, religion, sex, or age.

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Dissent. The disagreement of one or more judges with the decision of the majority.

Docket. An official list of cases to be tried in a court.

Due Process of Law. Law in its regular administration through the courts of justice; the guarantee of due process requires that every person be protected by a fair trial; *i.e.,* the right to an impartial judge and jury, the right to present evidence on one's own behalf, the right to confront one's accuser, the right to be represented by counsel, etc.

Equal Protection of the Law. A constitutional guarantee of the Fourteenth Amendment, which protects against unlawful discrimination by the states.

Executive Order. A rule or order issued by the executive branch that has the force of law.

Ex Parte. By or for or on the request of one party only, without notice to any other party.

Federalism or Federal System. As applied to the United States, a division of powers between the federal or U.S. government and the governments of the fifty states. The states have powers of their own, such as power to create a public school system. The federal government has powers such as the control over coinage and the regulation of foreign trade. Both have concurrent powers in such areas as taxation and public health and welfare.

Freedom of Speech. The First Amendment right to say and to hear what you want as long as you do not interfere with others' rights. The constitutionally protected rights to the freedoms of speech, press, and assembly, as well as the right to petition the government, are not absolute rights, but each will usually be protected under the First Amendment.

Impeachment. A formal accusation of a crime or other serious wrongdoing brought against a person holding an office of public trust.

In Forma Pauperis. From the Latin, "as a poor man;" filing a lawsuit on one's own behalf for lack of counsel; many petitions to the Supreme Court from prisoners are in this form.

Indictment. An accusation by a grand jury that a person has committed a crime. This does not mean that the accused is guilty. It simply means that the grand jurors believe there is evidence that the person has been involved in a criminal act and that the evidence is sufficient to justify a trial.

Indigent. In the context of this book, a defendant too poor to pay attorneys' fees or court costs.

Inferior Court. Any court subordinate to the chief appellate court in a particular judicial system.

Injunction. A court order prohibiting a threatened or continuing act.

Interstate Commerce. Economic transactions conducted between two or more states; regulated by Congress under Article I, section 8, cl. 3. of the Constitution, known as the Commerce Clause.

Intrastate Commerce. Economic transactions conducted within a particular state.

Judicial Review. The power of the Supreme Court to declare an act of Congress unconstitutional. *Marbury v. Madison* is the classic case of judicial review.

Jurisdiction. Authority; the kinds of subjects and geographic area over which an official body has authority to make decisions and take action.

Jury. A given number of persons selected according to the law to determine issues of fact on the basis of evidence brought before them.

Grand Jury. A jury of inquiry that receives complaints and accusations in criminal cases; it hears the prosecutor's evidence and issues indictments in cases where there is probable cause to believe that a crime was committed and that a trial should be held.

Litigation. The process of resolving a dispute over legal rights in court.

Moot. Not actual; theoretical or hypothetical. Usually in reference to a court's refusal to consider a case because the issue involved has been resolved prior to the court's decision, leaving nothing which would be affected by the court's decision.

Mandamus. A writ that commands a particular act and is issued from a court of superior jurisdiction to a person, corporation, public officeholder or an inferior court.

Opinion. A written statement of a judge setting forth the reasons for a decision and explaining his or her interpretation of the law applicable to the case. A **majority** opinion represents the views of more than half of the judges who participated in the case. A **plurality** opinion represents the views of the greatest number of judges, but less than half of those who heard the case. For example, suppose nine judges hear a case and decide it by a five-to-four vote. If all five agree in their reasons for the decision and join in an opinion stating those reason, it would be a majority opinion. However, if three of the five agree on the reasoning and the other two agree with the decision but not with the reasoning, the opinion of the three would be a plurality opinion. A **dissenting** opinion is one which disagrees with the decision of the majority. A **concurring** opinion agrees with the decision of the majority, but differs from the reasoning of the majority opinion.

Overrule. To overturn; as, for example, when a court of appeals decides that a previous decision in a different case, by that court or by a lower court, was incorrect. After a case has been overruled it can no longer be referred to as a precedent.

Per Curiam Opinion. (By the court) An opinion stating the decision of all the judges, and not signed by any particular judge.

Petitioner. One who makes a formal request, who brings a lawsuit before the court.

Plaintiff. The complaining party to litigation; one who initiates the court action.

Probable Cause. A reasonable ground, established after investigation, for believing that facts warrant further proceedings.

Precedent. A prior judicial decision that serves as an example or rule to authorize or justify another; See **Stare Decisis.**

Remand. To send back to a lower court. A higher court can remand a case to a lower court with instructions to carry out certain orders.

Respondent. The party in an appellate action who responds to a petition offered by the other party.

Reverse Discrimination. Unequal treatment of a person or persons resulting from favorable treatment of other persons who had been previously discriminated against. Reverse discrimination is often claimed by white males who are treated unfavorably when blacks or women are treated favorably to make up for the effects of past discrimination. (See also **Affirmative Action.**)

Right to Counsel. The right of the accused in a criminal trial to be represented by an attorney.

Rule of Law. A legal principle, recognized by authorities, and used as a guide in deciding cases. Also, a system of government in which the law of the land is the highest authority and no individual or group can disregard or disobey the law without penalty; laws can be changed only through procedures provided by the law.

Rule of Reason. Legal reasoning that allows an action to continue as long as it was within "the rule of reason guided by the established law;" see especially the doctrine asserted in the Standard Oil case (*Equal Justice,* pp. 61–62) by Justice Edward White (see topic 6 also).

Search and Seizure, Unreasonable. In general, an unlawful search of one's premises or person; a search which is unreasonably oppressive in its invasion of privacy.

Search Warrant. A written order from a justice or magistrate directing an officer to search a specific place for a specific object, issued upon a showing of probable cause.

Sedition. The act of inciting resistance to lawful authority.

"Separate But Equal" Doctrine. Doctrine introduced in *Plessy v. Ferguson* allowing racial segregation if various facilities met the same standards for each race; overruled in *Brown v. Topeka Board of Education.*

Stare Decisis. Doctrine saying that once a court has once laid down a principle of law applying to a certain set of facts, it will adhere to that principle and apply it to future cases where the facts are substantially the same; see **Precedent.**

Statutes. Laws enacted by the legislative branch of government.

Stay. To stop or hold off. To stay a judgment is to prevent it from being enforced.

Subpoena. An order commanding a witness to appear and testify personally, or to produce certain evidence.

Supreme Court. The highest court of most states; the highest court of the United States. The U.S. Supreme Court is made up of a chief justice and eight associate justices appointed by the president. The U.S. Supreme Court has both appellate and original jurisdiction. Most cases reach it through its appellate jurisdiction. Appeals can be made at every level from local courts through federal courts of appeal and state supreme courts until they reach the U.S. Supreme Court. The Supreme Court has original jurisdiction (the ability to hear cases from their beginning) only if a state or an ambassador or other United States minister is one of the parties. After hearing all arguments in a case, the justices discuss the case in private. They then give their opinions, beginning with the chief justice and proceeding in order of seniority. After the last opinion is stated they vote in reverse order. If the chief justice votes with the majority he can write the majority opinion, or he can select another justice to write it. If the chief justice votes with the minority, the production of the majority opinion rests with the senior justice voting with the majority. Any justice who disagrees with the majority opinion may write a dissenting opinion; any justice who agrees with majority opinion, but disagrees with some of the reasoning expressed in it or having additional arguments in support of it, may write a concurring opinion. Supreme Court decisions must be followed by lower courts in similar cases. However, the Supreme Court itself need not abide by its earlier decisions if it becomes convinced that circumstances demand a new approach. After a major decision, legislatures often revise laws to bring them into accord with the Constitution as interpreted by the decision.

Supremacy Clause. Article 6, cl. 2 of the Constitution, which declares the federal Constitution and laws to be binding over the state constitutions and laws (see topic 3).

Sustain. To allow or admit as valid.

Warrant of Arrest. An order issued by a magistrate, justice or other competent authority to a peace officer requiring the arrest of the person named therein.

Writ. A court order requiring the performance of a specified act, or giving authority and commission to have such an act done.

Writ of Habeus Corpus. From the Latin, "you have the body," the name of a writ used to bring a person before a court or judge; it is usually addressed to an official or person who holds another, such as the warden of a prison, demanding that the detained person be brought to court to determine whether his or her freedom is being unlawfully denied.

APPENDIX B

Guidelines for Using Case Studies

(Most of the following discussion is excerpted with permission from *Teaching About the Law*, by Ronald A. Gerlach and Lynn W. Lamprecht (Cincinnati: W. H. Anderson Co., 1975), pp. 148-161. Copyright 1975 by the W. H. Anderson Publishing Co.)

The selection of appropriate legal cases should be a crucial aspect of this approach. Not every case involving a legal decision or interpretation can be considered a "good" case. Cases that are chosen must center upon significant legal questions that persist and recur in human experience and the law. The cases must also pose a variety of possible alternative solutions and provide dramatic interest for the student.

GUIDE TO RESEARCHING CASES

In choosing cases, you or your students will probably have to learn how to decipher case citations. These look hard at first, but actually are quite simple. Legal citations always take the following form: *Miranda v. Arizona* [384 U.S. 436 (1966)]. First comes the name of the case, *Miranda v. Arizona*, with the plaintiff—or petitioner or appellee when the case in on appeal— listed first; the defendant—or respondent or appellant on appeal— is second. Next comes the volume number (384), identification of the series of reports in which the case appears (U.S. Reports here), the page number on which the case begins (436), and the year in which the decision was rendered (1966).

To find this case, then, all you'd have to do is turn to page 436 of volume 384 of U.S. Reports.

Once you've mastered the basic form of citations—first number is volume, second is page, third the year of decision—the only mystery will be found in the abbreviations used for the various reporter systems. These are easy for the systems containing decisions of the U.S. Supreme Court. Full texts of decisions of the U.S. Supreme Court appear in four main series of reports.

1. United States Reports (U.S.)—the official edition published by the U.S. Government Printing office. Early volumes of this series are listed by the official court reporter who prepared the record. However, since all these early volumes have been incorporated into the United States Reports, you can also find them by their volume number in that series. Thus Cranch 1 (U.S. 5) is the same book—the first volume prepared by Cranch, the fifth in the U.S. Reports.
2. Supreme Court Reporter (S.Ct.)—contains annotations on various subjects in addition to the texts of opinions
3. United States Supreme Court Reports, Lawyers' Edition (L.Ed. or L.Ed. 2d)—similar to Supreme Court Reporter, but with more complete annotations
4. U.S. Law Week (U.S.L.W.)—contains most recent Supreme Court decisions, published each Tuesday by the Bureau of National Affairs

All of these will probably be available in law school and county law libraries. Some or all of these reports may be also available in bar association libraries and the libraries of law firms. Establishing contacts with law librarians, practicing attorneys, and others with access to these documents will be helpful to you and your students.

PREPARATIONS

The instructor must be properly prepared and well informed on the subject if the case study approach is to be utilized successfully. The instructor must serve as a facilitator rather than as an authority figure in the learning process. Through the use of questioning, the instructor raises doubt in students' minds on a particular legal issue. This procedure helps to clarify student thinking and reasoning and assists the students in resolving the conflict. The instructor should avoid imposing conclusions or personal biases upon students. When a particular position has not been adequately considered, the instructor may express a point of view to the class, but it should be identified as such.

The active involvement of the student in analyzing a legal case is crucial to the approach. Participating in class discussions in which a particular legal problem is identified and sides are taken, points of view are stated, considered and weighed, and decisions are formulated and evaluated, remains the primary means by which students develop their own critical thinking ability. This is how an understanding of the law evolves from the case method of teaching.

The case study approach to the teaching of legal concepts and issues encourages teachers and students to engage in one or more of the following activities: (1) a statement or review of all the facts of a particular case; (2) an investigation or treatment of the issues and arguments of that case; and (3) an analysis or consideration of the decision, including the legal reasoning behind and implications of the ruling.

CASE METHOD ACTIVITY SEQUENCE

1. Review of the Facts
   - What are significant facts in the case?
2. Investigation of Issues/Arguments
   - What legal issues are involved?
   - What arguments might be presented?
3. Consideration of Decision and Reasoning
   - What would you decide? Why?
   - What was the court's decision?
   - Why did the court come to that conclusion rather than another one?

As a discussion leader, an instructor utilizing the case method approach must provide the class with the necessary background information and materials needed. He or she should pose questions that encourage students to: (1) rationally examine a case – facts, issues, arguments, decision; (2) express and explore, as well as be able to explain and support, alternative points of view; (3) focus upon points of major importance and reflect upon the consequences of each; and, perhaps most important, (4) clarify their own thinking and values. Questions should promote the interchange of ideas among students and call for student thought rather than simple "yes/no" responses or the repetition of facts. The classroom questions should point out assumptions or weaknesses in reasoning, have a logical sequence or rational order, be clear and direct, and be within the answering capabilities of the students. In addition, questions should build on the class' preceding responses and ideas as well as its initial interests.

An alternative strategy to have the entire class develop arguments for both sides would be to divide the class into committees or "law firms" and have the firms prepare arguments for the plaintiff and defendant. Their arguments can then be presented to the class for consideration and discussion.

Although the case study approach has a number of distinct advantages for classroom use, it is not without its limitations as an instructional method. For example, the case approach assumes that the students possess certain background information and that they will be able to comprehend the facts of the case under consideration. If these two conditions are not fulfilled, a lesson based upon a case study would be unproductive and frustrating to both teacher and students.

One way in which an instructor can promote the study of a legal case is to provide the class with a handout describing the facts, issues, arguments, court reasoning, and decision. After asking several questions designed to test general comprehension of the information contained in the handout, the teacher should center the discussion on student evaluation of the decision. These procedures are outlined in Diagram 1, which follows:

Diagram 1

STUDENTS GIVEN ENTIRE CASE

Student case handout includes:
1. Facts
2. Issues
3. Arguments
4. Reasoning
5. Decision

Class discussion centers on:
1. Ascertaining student comprehension of the facts, issues, arguments, decision included in handout.
2. Student evaluation of court decision and reasoning.

A second way a teacher might use a legal case in the classroom is to give the students a handout describing only the facts, the issues, and the arguments. In contrast to the first set of procedures, the teacher asks the students to reach their own decision on the case in light of the arguments and facts presented to them in the handout. Finally, the actual court's decision and reasoning in the case is introduced and compared with the students' position. These procedures are outlined below in Diagram 2:

Diagram 2

STUDENTS GIVEN ONLY CASE FACTS, ISSUES, ARGUMENTS

Student case handout includes:
1. Facts
2. Issues
3. Arguments

Class discussion centers on:
1. Ascertaining student comprehension of facts, issues, and arguments (included in the handout).
2. Student formulation and evaluation of court decision and reasoning.

An alternative strategy for encouraging class discussion of the court's decision and reasoning is to provide the students with a handout describing the facts, issues, and arguments of a case along with unmarked quotes taken from the majority decision and dissenting opinions. After posing several questions designed to test student understanding of the material contained in the handout, the teacher asks the students to select the opinion with which they most agree and to give reasons for their choice. These procedures are outlined in Diagram 3:

Diagram 3

STUDENTS GIVEN UNMARKED OPINIONS

Student case handout includes:
1. Facts, issues, arguments
2. Unmarked judicial opinions

Class discussion centers on:
1. Ascertaining student comprehension of the facts, issues, opinions
2. Student selection/justification/evaluation of court opinion

Perhaps the most challenging way in which a teacher can present a legal case to a class is to give the students only the facts of the case. Following some initial comprehension questions, the instructor asks the students to identify the issue(s) involved in the case, to develop arguments for both sides, and to decide the case on the basis of the arguments. This procedure is outlined below in Diagram 4:

Diagram 4

STUDENTS GIVEN ONLY THE FACTS

Student case handout includes:
1. Facts

Class discussion centers on:
1. Ascertaining student comprehension of the facts (found in handout).
2. Promoting student identification of the issues, preparation of arguments, development of a decision, and evaluation of decision.

APPENDIX C

Guidelines for Conducting Moot Courts

(The following is reprinted with permission from *Leader's Handbook* (Santa Monica, California: Law in a Free Society, 1977), pp. a7-a9. Copyright 1977, 1978 by Law in a Free Society.)

It is important that all participants understand that a moot court is patterned after an appeals court or a Supreme Court hearing. Students may expect a mock trial, so you must be prepared to explain that in a moot court the court, composed of a panel of judges, is asked to rule on a lower court's decision. No witnesses are called, nor are the basic facts in a case disputed. Arguments are prepared and presented on the application of a law, the constitutionality of a law, or the fairness of previous court procedures. In many ways a moot court is like a debate, for each side presents arguments for the judges' consideration. Moot court hearings often help participants develop a greater understanding of the appellate level of our legal system and of the subject being debated.

HOW TO PROCEED

1. Select a case (actual or hypothetical) to appeal that raises questions relevant to a concept being studied. Prepare a statement of facts which includes a summary of essential evidence from the trial and the court decision to be appealed.
2. Divide the class into groups of from nine to twelve participants; divide each group into three-or-four-member litigant teams or "judicial panels." Some teams are designated as "appealing litigant teams" and will have the responsibility of arguing against the ruling of a lower court; some teams are designated as the "supporting litigant teams" and will present arguments in favor of the lower court's decision; some teams will serve as judicial panels.

   Another way to organize the class is to designate nine persons (eight if a resource person serves as chief justice) as court members. These participants will be responsible for preparing written opinions. The rest of the class is divided equally into the two litigant teams. Yet a third format is to present a more realistic court session by involving a court officer and court reporter.

   No one format is preferable to another in terms of learning outcomes. Which one is chosen should depend on ease of management and the amount of time that can be devoted the activity.
3. Time should be provided for discussion of the issues and preparation of oral arguments. Each litigant team should choose at least two people to present its arguments before the court.
4. Each participant should be given a copy of "Instructions for Moot-Court Hearings" (below) and the statement of facts.

INSTRUCTIONS FOR MOOT-COURT HEARINGS

1. Participants should consider all of the details presented in the statement of facts to have been established in a trial court. Teams may not argue that any of those facts are inaccurate.
2. Arguments do not need to be confined to existing legal precedents or recognized legal theories. Any argument thought to be persuasive from a philosophical, theoretical, conceptual, or practical standpoint can be made. Teams may rely on principles founded on the U.S. Constitution.
3. Each litigant team should be prepared to present its oral arguments to a panel of judges. At least two members of each litigant team should present the team's oral arguments before the court of appeals. Teams may have an many spokespersons as they wish. The "appealing litigant teams" present their argument first, followed by the "supporting litigant teams."
4. Teams should anticipate active questioning from the judges during oral presentations. Spokespersons representing each litigant team are expected to respond to questions and concerns raised by the judges immediately upon being challenged. Discussions with the judges in this manner will not extend the team's time unless the court exercises its discretion to permit an extension of time for the team's scheduled presentation.
5. Litigant teams' oral arguments are limited to a specific amount of time. The court has the discretion to grant extra time, but should not normally exercise this privilege. Any extensions of the time should be for a stated number of minutes. Teams may reserve a part of their total argument time for rebuttal argument, or they may choose not to reserve such time. If time is reserved, it should be used to counter opponents' arguments, not to raise new issues.

   A member of the opposing team should serve as the presenting team's time adviser during the arguments. The following intervals showing the number of minutes left may be used by the time adviser: 10, 5, 4, 3, 2, 1, 1/2. Time advisers should hold up cards for the team's attention and for the court to see. If arguments have not been completed, spokespersons are nevertheless to terminate their presentations precisely upon expiration of the allotted time, unless the presiding judge grants an extension of time.

6. After the arguments for both the "appealing litigant" and "supporting litigant" teams have been heard by the court, the panel of judges should deliberate and reach a decision. Deliberation of the case may take place in private or may be conducted before the class. A time limit for these deliberations will probably be required.

7. After the decisions have been announced, class participants and attorneys should discuss the different courts' decisions, the issues raised, and moot-court procedures.

APPENDIX D

Materials on the Supreme Court

Many useful books and periodicals deal with the Supreme Court in American history. They can be found under such headings as autobiography and biography, history, political science, case books in the law, and such popularly written accounts as *The Nine Old Men* and *The Brethren.* It is not possible to list all of them. The following bibliography is simply a sample of those that warrant the attention of teachers.

Decisions and Great Cases

This section discusses some of the sources we used in putting this guide together, all of which provide useful case summaries and analyses.

PERIODICALS

The Bill of Rights in Action, a quarterly, covers a different topic with each issue and often contains articles on the Court and its cases. In addition, this free resource provides discussion questions and classroom activities. Available from: The Constitutional Rights Foundation, 601 South Kingsley Drive, Los Angeles, CA 90005.

Update on Law-Related Education is a magazine for teachers of law-related education. It includes articles on current Supreme Court cases, developments in the law, and landmark cases in the past. Many issues focus on constitutional provisions (free speech, search and seizure, etc.) Topics 1, 12, 13, and 15 are based in part on *Update* articles. Annual subscriptions (for three issues) are $9.50, with individual magazines available for $2.50. Available from: Order Fulfillment, American Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611.

Preview of U.S. Supreme Court Cases is a periodical which appears regularly during the Supreme Court's term and reports on all cases which are to be orally argued. *Preview* appears before decisions are rendered, providing readers with detailed information on the facts, issues, background, significance, and arguments of the cases, so that they may better understand decisions when they come down. Two *Preview* cases are presented in greatly abridged form in topic 11. Annual subscriptions (for 15 to 20 issues) are $62; individual copies are $2.50. Available from: Order Fulfillment, American Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611.

BOOKS

Arbetman, Lee, and Roe, Richard, *Great Trials in American History: Civil War to the Present* (1985). This book, prepared by the National Institute on Citizen Education in the Law, provides extensive discussions of 16 major cases, 11 of which reached the U.S. Supreme Court. The discussion of the Escobedo and Miranda cases in topic 13 is based on this source. The book includes questions, and a teacher's guide provides extensive interpretations and activities. It costs $10.95 and is available from West Publishing Co., 170 Old Country Road, Mineola, NY 11501-0509.

Bartholomew, Paul C., and Menez, Joseph F., *Summaries of Leading Cases on the Constitution* (1983). Perhaps the most comprehensive source of this list, covering several hundred landmark cases decided by the U.S. Supreme Court. Summaries are concise, follow the same format, list corollary cases and frequently contain helpful notes. (Topic 8 contains abridged examples which omit the corollary cases.) This standard work, now in its twelfth edition, costs $5.95. Available from Rowman & Allanheld, 81 Adams Drive, Totowa, NJ 07512.

Haiman, Franklyn S., *Freedom of Speech* (1983). This is a sourcebook for excerpts from cases and commentary on the free speech and free press guarantees of the First Amendment. Topic 7 of this guide is based in large part on this source. The book costs $10 and is available from National Textbook Company, 4255 W. Touhy, Lincolnwood, IL, 60077. (*Freedom of Speech* is part of the "To Protect These Rights" series. Other volumes are: *Due Process of Law, Racial Equality, Religious Freedom, Rights of Privacy* [our source for the abortion discussion in topic 15], and *Woman and the Law.* All six books are available for $39.95, with an accompanying teacher's guide.)

Heathcock, Claude L., *The United States Constitution in Perspective* (1972). This book provides commentary on each part of the Constitution, as well as case studies of some major cases. It is the source of much of our discussion in topic 5. (Allyn & Bacon, Boston.)

James, Leonard F., *The Supreme Court in American Life* (1971). This brief secondary-level book describes the Court's role in a number of major areas of American life. It is the source of much of our discussion in topics 6 and 11. (Glenview, IL: Scott, Foresman and Co.)

Lengel, James G., and Danzer, Gerald A., *Law in American History* (1983). This secondary text discusses a number of landmark cases in tracing the evolution of American law. Topics 3 and 14 are largely based on this source. It costs $7.10 and is available from Scott, Foresman and Co., 1900 E. Lake View Avenue, Glenview, IL, 60025.

Starr, Isidore, *The Idea of Liberty* (1978). This book on the guarantees of the First Amendment served as our source for much of topics 9 and 11. It looks at landmark cases from all areas of the First Amendment and contains a number of questions for discussion. It costs $4 and is available from West Publishing Co., 170 Old Country Road, Mineola,

NY 11501-0509. (*The Idea of Justice* [1981], another volume in the Great Ideas in the Law Series, is also available from West.)

Swindler, William F., *The Constitution and Chief Justice Marshall* (1978). This scholarly work contains analyses of all the great Marshall Court decisions, as well as the full texts and related documents of several decisions. It is largely the basis of our topic 4. (New York: Dodd, Mead & Company).

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