

I. MARBURY V. MADISON*

5 U.S. (1 Cranch) 137 (1803)**

WHAT WAS THIS CASE ABOUT?

The story. The time was early 1801. The Federalist party had been defeated by the Democratic-Republicans in the presidential and congressional elections. However, the winners of the election were not due to take office until March 4. In the meantime the Federalists were determined to do whatever they could to hold their party's power. One action they could take was to appoint supporters of the Federalist party to offices that were not filled by election. So, they chose a number of party supporters as justices of the peace in the District of Columbia. These people were nominated by the outgoing president, John Adams, and confirmed by the Senate at the last minute—on March 3. Their “midnight appointments” seemed to be just in time. But no one could take office as a new justice of the peace until his commission had been delivered to him. The job of delivering it fell to the acting secretary of state, John Marshall. The next day when the new president, Thomas Jefferson, took over, he found that John Marshall had not had time to deliver all of the commissions before his term of office ended. Jefferson was delighted. He immediately ordered his new secretary of state, James Madison, not to deliver the rest of the commissions. The people who had been confirmed by the Senate as justices of the peace could not take office after all!

William Marbury, one of the people whose commission was not delivered, sued James Madison. Marbury took advantage of a law passed by Congress that allowed him to make this kind of complaint directly to the Supreme Court. He asked the Court to order Madison to deliver the commission even though this request meant disobeying the president. Probably he expected the Court to do as he asked because John Marshall had been appointed chief justice of the Supreme Court. You remember that until James Madison took over as secretary of state on March 4, Marshall had held that job. Marshall was a strong Federalist. Moreover, he might have felt a personal responsibility to Marbury because he had not been able to deliver Marbury's commission in time.

The question. As Chief Justice Marshall saw it, the question before the Court had three parts. First, did Marbury have a right to receive the commission? Second, if he did have a right to the commission, was the government now required to make amends? Finally, if the government was required to make amends, would it have to order Madison to deliver Marbury's commission, as Marbury requested?

The issues. One might have thought that Chief Justice Marshall would want Marbury to receive his commission. Perhaps he did, but he cared even more about something else—the power of the Supreme Court itself. He considered it deeply important that the Court have a role in the system of checks and balances. Specifically, he wanted the Court to be able to decide if laws passed by Congress were constitutional. Whether or not the Court had this power of **judicial review** had not yet been decided. Marshall posed the question before the Court in the way he did in order to discuss judicial review.

HOW WAS THE CASE DECIDED?

Two years later, in an opinion written by the chief justice himself, the Court ruled against ordering James Madison to deliver Marbury's commission. Is this ruling what you expected?

WHAT DID THE COURT SAY ABOUT GOVERNMENTAL POWERS?

First let's see how the Court reached its decision. Remember that Marshall had said that the question before it had three parts. Each part had to be answered before the Court could go on to the next part. So, the Court's reasoning went through three steps.

Step 1. Did Marbury have a right to the commission? Pointing to a law passed by

*The name of a court case is usually italicized. The two names represent the people involved in each case. The “v.” stands for “versus,” which means “against.”

**These numbers are the case citation. “5 U.S.” means that the case can be found in Volume 5 of the *United States Reports*. “(1 Cranch)” means that this corresponds to Volume 1 of an earlier set of case reports, now discontinued, kept by a man named Cranch. “137” is the number of the page on which the case begins.

“1803” designates the year in which the case was decided.

Congress, which told how justices of the peace should be appointed for the District of Columbia, the Court said that he did.

Step 2. Was the government required to make amends? The Court said that when government officials (such as Madison) hurt people (such as Marbury) by neglecting legal duties (such as delivering commissions), our laws require that a remedy be found for the injury.

Step 3. If the government was required to make amends, did that mean that Madison must be ordered to deliver Marbury's commission as Marbury had requested?

Marbury had asked that the Supreme Court simply order Madison to deliver the commission. Here Chief Justice Marshall did something surprising. Instead of giving a simple yes or no answer, he said yes, a court could issue such an order, but no, this was not the right court to issue it.

Why wasn't this the right court to issue it? Remember that Marbury had taken advantage of a law passed by Congress that allowed complaints such as his to be taken straight to the Supreme Court instead of going through lower courts. However, Chief Justice Marshall said that this law was unconstitutional. You know that the Constitution mentions several kinds of cases that can be brought straight to the Supreme Court. All other kinds of cases must go through lower courts first. Marbury's lawsuit, said the chief justice, was one of the kinds of cases that must go through lower courts first. It did not matter that Congress had passed a law saying something different, he said, because the Constitution is a higher law. When two laws come into conflict, judges must obey the higher of them. Besides, judges take an oath to support the Constitution.

Do you see how cleverly Marshall wrote the Court's opinion? Sometimes, in a game of chess, a player gives up something in order to get something even better. The player allows a piece to be captured because it is the only way to get the other pieces into a stronger position. This example is something like what Marshall did. He gave up the power, granted to the Court by Congress, of hearing lawsuits such as Marbury's before lower courts had heard them. But the way that he gave up this power was to claim for the Court an even greater power. This greater power was the

power of judicial review itself: the power to decide if laws made by Congress are allowed by the Constitution.

WHAT IMPLICATIONS DID THIS CASE HAVE FOR THE FUTURE?

Until 1803 nobody knew if judges really would be able to exercise such a power. In other words, nobody knew if the judicial branch would be able to play a role in the system of checks and balances at all. Without judicial review, Congress would decide for itself on the constitutionality of the laws it passed. By writing the opinion of the Court in *Marbury v. Madison*, Chief Justice Marshall changed all that forever. Today the judicial branch has taken its place as an equal to the legislative and executive branches. By deciding on the constitutionality of the actions of the other two branches, it is the nation's final authority on the meaning of the Constitution itself.

BRAIN TEASERS

1. What kinds of cases does the Constitution state may be heard by the Supreme Court?
2. If Chief Justice Marshall had not been eager to speak out on the subject of judicial review, how might his opinion have differed from the one he wrote?
3. If the judicial branch had not acquired the power of judicial review, then Congress would be its own judge of the constitutionality of its laws. Do you think it would be good or bad for Congress to have this power? Why?

2. MARTIN V. HUNTER'S LESSEE

14 U.S. (1 Wheat) 304 (1816)

WHAT WAS THIS CASE ABOUT?

The story. This case arose from an argument over who owned a certain piece of property in Virginia. Originally, the land had been owned by an Englishman named Lord Fairfax. In 1777, during the Revolutionary War, the

Virginia legislature had passed a law saying that the land of people who were still loyal to England no longer belonged to them. One of the people affected by this law was Lord Fairfax. When Lord Fairfax died in England in 1781, the land was passed down to his American relative, Thomas Martin. But the government of Virginia gave Fairfax's land to a man named David Hunter.

Thomas Martin still considered himself to be the true owner of the land. He did not think the Virginia law was valid. Hunter disagreed. He was so sure that he, not Martin, was the true owner of the land that he even rented it to someone else. Naturally, the renter (called the "lessee") tried to have Martin evicted. This dispute led to a long struggle in the state courts. Finally, Virginia's highest court ruled that Hunter's lessee was right. The land's true owner, it said, was Hunter, not Martin.

Martin appealed his case to the United States Supreme Court. He reminded the Court of the treaties made between America and England in 1783 and 1794. These treaties promised that America would protect the rights of British subjects who had owned property in America before the Revolutionary War. Because of these treaties, he said, Virginia's 1777 law was not valid. Thus, he was the true owner after all. The Supreme Court agreed. It sent the case back to the Virginia court with orders to change its decision.

But the Virginia court refused to obey these orders. Led by Judge Spencer Roane, it denied that the Supreme Court had the authority to tell a state court what to do. So, Martin had to ask the Supreme Court for help a second time. Because the Virginia court would not obey the orders to reverse its judgment, Martin wanted the Supreme Court to reverse the Virginia court's judgment.

The question. The question before the Court was not who was the true owner of the land. That question had been asked and answered the first time Martin had appealed to the Court. This time the question was different: In cases that involve the federal Constitution, laws, and treaties, does the Constitution give federal courts the power to reverse state court judgments?

The issues. You might think that the question before the Court had already been settled in

Marbury v. Madison (1803). After all, that case gave the Supreme Court the power of judicial review. It did not, however, settle the broader issue of just how far the power of judicial review extends. In *Marbury v. Madison*, the Supreme Court had overruled one of the other branches of the federal government. What Martin asked the Supreme Court to do in this case was overrule one of the branches of a state government.

HOW WAS THE CASE DECIDED?

Finally, in 1816, in an opinion written by Justice Joseph Story, the Supreme Court did what Martin asked. It reversed the judgment of the Virginia court.

WHAT DID THE COURT SAY ABOUT GOVERNMENTAL POWERS?

Justice Story thought that the Constitution gave the Supreme Court the power to reverse state court judgments in cases involving the federal Constitution, laws, and treaties. But how did he show that his view was correct? He might have simply quoted Article III, which says that "the judicial Power [of the United States] shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority." But Justice Story did not stop there.

First he tried to show why various objections to his view were mistaken. One objection was that the Constitution does not affect the state governments, but only the people in them. Justice Story pointed out that the Constitution is "crowded" with provisions that affect the state governments. Another objection was that if federal judges had the power of final decision about the meaning of the federal Constitution, laws, and treaties, they might abuse it. Justice Story explained that the power of final decision has to be put somewhere.

Finally, Justice Story explained the need for uniformity. If federal judges were not allowed to reverse state court judgments, then state courts in each of the different states might interpret the federal Constitution, laws, and treaties in different ways. "The public mischiefs that would attend such a state of things," he said, "would be truly deplorable [bad; disgraceful]."

WHAT IMPLICATIONS DID THIS CASE HAVE FOR THE FUTURE?

This case helps us understand some of the stresses and strains on our system of government. Under our Constitution, power is divided into two levels, state and national. This system of government is called **federalism**. State governments are not merely regional offices of the national government; they are truly independent. The founders of our country thought that federalism would help to preserve liberty. However, this safeguard of liberty has a price—a greater chance of conflict. Our history is full of various kinds of conflicts between the states and the national government.

Usually, as in *Martin v. Hunter's Lessee*, the national government has won these conflicts. Thus, there has been a slow drift of power from the states to the national government. However, the drift of power has often been challenged and will no doubt continue to be challenged.

Notice, though, that Justice Story did not claim that federal courts could overrule state courts in all cases. He said only that they could overrule state courts in cases involving the United States Constitution, laws, and treaties. In matters that did not involve the federal Constitution, laws, and treaties, the judgments of state courts would be final. This principle still holds.

BRAIN TEASERS

- As you have just read, federal courts can reverse state court judgments only in cases involving the federal Constitution, laws, and treaties. How did *Martin v. Hunter's Lessee* involve federal laws or treaties?
- Justice Story said that if state courts in each of the different states were allowed to interpret the federal Constitution, laws, and treaties in different ways, "the public mischiefs that would attend such a state of things would be truly deplorable." What kinds of "public mischiefs" do you think he had in mind? Why would they be "deplorable?"
- Find the article and paragraph of the Constitution that says that the Constitution

and the laws and treaties made to help carry it out "shall be the Supreme Law of the Land." What does this provision say about state governments?

3. *McCULLOCH V. MARYLAND*

17 U.S. (4 Wheat) 304 (1819)

WHAT WAS THIS CASE ABOUT?

The story. In 1791 Congress passed a law that set up a Bank of the United States. The bank helped American manufacturing by making loans to businesses. Congress, however, had granted the bank only a 20-year **charter**. Over these two decades, the bank became unpopular. An attempt to renew its charter in 1811 failed, and it went out of business. A number of states took advantage of this situation and began chartering banks of their own.

After the War of 1812, the federal government needed money to pay for the war. But instead of being able to borrow money from one central bank, it had to deal with many state banks. Thus, Congress set up a Second Bank of the United States in 1816. The states opposed the new national bank because their own banks were losing business to it. Several states struck back. They passed laws that hindered the national bank in various ways. For instance, they placed heavy taxes on branches of the national bank within their borders. The bank refused to pay these taxes.

One of the states that tried to tax the national bank was Maryland. When the Maryland branch of the national bank refused to pay the taxes, the state government sued the bank's cashier, James McCulloch. A year later, in 1819, the legal battle between McCulloch and Maryland reached the Supreme Court.

The question. As seen by John Marshall, the chief justice, the question before the Court had two parts. First, does the Constitution give Congress the power to establish a national bank? If so, then does the Constitution allow Maryland to tax that bank?

The issues. The question of whether or not the Constitution gives Congress the power to establish a bank had come up once before. In

1791, after Congress had passed the bill setting up the First Bank of the United States, President Washington had asked his cabinet for advice. He saw that although Article I, Section 8, of the Constitution lists the powers of Congress, it does not include the power to charter a bank. On the other hand, it states that besides the listed powers, Congress may also make all laws that are "necessary and proper" for carrying out the listed powers.

Thomas Jefferson, the secretary of state, and Alexander Hamilton, the secretary of the treasury, presented Washington with sharply opposing views. Hamilton considered the power to charter a bank constitutional because it had "a natural relation" to the powers of collecting taxes and regulating trade, listed in Section 8. By contrast, Jefferson said that while the power to charter a bank may be "convenient" for carrying out this power, it was not "necessary" to it. Therefore, he said that the power to charter a bank was unconstitutional.

Finding Hamilton's argument more convincing, Washington signed the bank bill into law. Now, though—a full generation later—the issue was reopened over the Second Bank of the United States. Maryland wanted the Supreme Court to interpret the Constitution in the way that Washington had rejected 28 years previously.

HOW WAS THE CASE DECIDED?

Led by Chief Justice Marshall, the Court ruled that the Constitution allowed Congress to establish a national bank but that it did not allow Maryland to tax the bank.

WHAT DID THE COURT SAY ABOUT GOVERNMENTAL POWERS?

Remember that Jefferson's argument against the First Bank of the United States had rested on a narrow interpretation of the word "necessary" in the "necessary and proper" clause. The state of Maryland used the same argument against the Second Bank of the United States. Chief Justice Marshall, however, said that Maryland's interpretation of the Constitution was not broad enough. In ordinary speech, he explained, when we say that certain means are "necessary" to an end we don't usually mean that we can't achieve

the end without them. Rather we mean merely that they are "calculated to produce" the end. Certainly, the power to charter a bank is calculated to help carry out the other constitutional powers, so the Constitution permits it.

The second question before the Court was whether or not the Constitution allows Maryland to tax the national bank. Marshall said that if the states could tax one of the federal government's activities, they could tax any of them. But "the power to tax," said Marshall, "involves the power to destroy." He meant that by taxation, the states could prevent the federal government from accomplishing any of its purposes. This could not be permitted because of the wording in the second paragraph of Article VI. According to this "supremacy clause," the Constitution and laws of the federal government come before the constitutions and laws of the states.

WHAT IMPLICATIONS DID THIS CASE HAVE FOR THE FUTURE?

As new cases arise, members of the Supreme Court try to settle them by using principles that have been developed in earlier cases. What principles does this case involve?

- The principle of implied powers

Some powers given the federal government by the Constitution are listed. These are called **enumerated powers**. Others, however, are understood as given because they are needed to help carry out the enumerated powers. These powers are called **implied powers**. The principle of implied powers greatly enlarged our understanding of what the Constitution allows the federal government to do.

- The principle of national supremacy

The federal Constitution and federal laws come before the constitutions and laws of the states. This principle is easy to misunderstand. It does not mean that the federal government may make the states do whatever it pleases. The federal government has only those powers that are enumerated and implied in the Constitution. All other powers are denied to it. But when the federal government is using powers that do belong to it, the states must give way.

BRAIN TEASERS

1. Where in the Constitution can you find the principle of implied powers? the principle of national supremacy?
2. The 10th Amendment states that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Early in the nation’s history, many Americans thought this amendment meant that the federal government had only those powers that were actually listed in Article I, Section 8. What does John Marshall’s reasoning suggest about this view?
3. Do you agree with Jefferson’s “narrow” interpretation of the Constitution or with Hamilton’s “broad” interpretation of the Constitution? Why?

4. *DRED SCOTT V. SANDFORD* 60 U.S. (19 How.) 393 (1857)

WHAT WAS THIS CASE ABOUT?

The story. In the mid-1800s the heated issue of slavery in the territories was on everyone’s mind. One question that arose from this issue was what would happen to the status of a slave who was taken into free territory. This was the situation in which Dred Scott found himself.

In 1833 Dred Scott was purchased by an army doctor named John Emerson. As the army transferred Emerson from post to post, Scott went with him. First they went to Illinois; later they moved to the Wisconsin Territory. When Emerson was transferred yet again, he sent Scott to Missouri, a slave state, to live with his wife, Mrs. Irene Sanford Emerson. She inherited Scott when her husband died in 1843.

The key point to remember is that at this time, slavery was illegal in two of the places in which Dred Scott had lived. It was illegal in Illinois because of state law and in Wisconsin Territory because of the Missouri Compromise of 1820. Scott believed that because he had lived for five years on free soil, he should be free.

Scott’s first attempt to gain his freedom came in 1846. Mrs. Emerson moved to New York and left Scott temporarily with the two sons of Scott’s original owner. One son, a lawyer, was opposed to the extension of slavery. He helped Scott file a lawsuit asking the courts of the state of Missouri to declare Scott free.

In 1852, after six long years, the Supreme Court of Missouri ruled against Scott. This might have ended the story, but it did not. One year earlier, Mrs. Emerson had sent Scott to one of her brothers in New York, named John Sanford*. Meanwhile, the United States had won the war with Mexico, and its boundaries now stretched clear to California. The issue of slavery in the territories had to be settled. In 1854 Scott’s original lawsuit was revived by lawyers who wanted to see the issue resolved. The feeling of the public was that a decision had to be made by the United States Supreme Court. Mrs. Emerson transferred her title of ownership of Scott to John Sanford, and Scott’s case got on the docket of the Federal Circuit Court of Missouri. By 1857 Scott’s case had finally worked its way to the Supreme Court.

The question. Roger B. Taney, the chief justice, saw the case as asking two questions. First, does the Constitution give an African American the right to start a suit in a federal court? Second, does the Constitution allow Congress to make a law that takes slaves away from people who bring them into a free territory?

The issues. If African Americans are citizens of the United States, then they must have all of the rights of other citizens, including the right to bring suit in federal court. Therefore, the first question before the court involved what the Constitution says about who is a citizen.

If slaves are property, then when Congress wants to make a law dealing with slavery, it must be limited in all of the same ways as when it wants to make a law dealing with property. Therefore, the second question before the Court involved the issue of what kinds of limits the Constitution puts on laws about property.

*You may have noticed that the Supreme Court’s title of the case spelled the name Sandford with the letter “d” in the middle. The misspelling was an error made by the Supreme Court.

HOW WAS THE CASE DECIDED?

The Court ruled that the Constitution denied blacks the right to sue in federal court and denied Congress the power to make a law taking slaves away from people who bring them into a free territory.

WHAT DID THE COURT SAY ABOUT CONSTITUTIONAL RIGHTS?

One theme of the Court's opinion was the relation between race and citizenship. What Chief Justice Taney said reflected the prejudices of the day. He said that African Americans had "none of the rights and privileges" of citizens. This statement was especially startling because it applied not only to slaves, but also to free blacks.

The chief justice ignored an important fact. Whether or not free blacks were United States citizens, many states considered them state citizens. Article III, Section 2 of the Constitution says that the federal courts have jurisdiction over a number of various kinds of suits involving state citizens. Dred Scott's suit involved actions between citizens of different states. At least, then, the chief justice might have reasoned that free blacks in states that considered them state citizens could bring certain kinds of suits in federal courts.

The other theme of Chief Justice Taney's opinion concerned slavery rather than race. The Fifth Amendment contains a clause stating that nobody may be "deprived of life, liberty, or property, without due process of law." First, the chief justice reasoned that because slaves are "property," slaves cannot be taken away without "due process of law." Second, he reasoned that a law taking away the property of law-abiding citizens just because they have entered a free territory cheats them of their "due process of law." Taney's conclusion was that the Missouri Compromise of 1820 was unconstitutional. Congress should not have made a law that took slaves away from people who brought them into a free territory.

WHAT IMPLICATIONS DID THIS CASE HAVE FOR THE FUTURE?

By the time the Court made its decision, the Missouri Compromise's ban on slavery in certain federal territories had already been

canceled by the Kansas-Nebraska Act of 1854. Therefore, it might seem that the Court's judgment that the Missouri Compromise was unconstitutional did not matter. But the Kansas-Nebraska Act was unpopular with people who opposed the extension of slavery. They would have liked to have seen a return to something like the Missouri Compromise. After the Court declared the Missouri Compromise unconstitutional, however, such a return was impossible. Rather than settling the controversy over slavery in the territories, *Dred Scott v. Sandford* heated it up. The Supreme Court's ruling hastened the coming of the Civil War.

One of the results of the Civil War was that the slaves were freed. Because of *Dred Scott v. Sandford*, though, merely freeing them was not enough to guarantee their citizenship. Not until 1868, when the 14th Amendment was passed, was the citizenship of African Americans guaranteed by the Constitution. As the amendment's very first sentence declares, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The 14th Amendment and other post-Civil War amendments were milestones on the road to full equality for people of all races.

BRAIN TEASERS

1. According to the Constitution, over what other kinds of suits involving state citizens do the federal courts have jurisdiction?
2. How did Article III of the Constitution contradict Chief Justice Taney's conclusion that African Americans, whether slave or free, could not bring suits in federal courts?
3. Carefully read the 13th, 14th, and 15th Amendments. How did the amendments reverse the Court's positions in *Dred Scott* on race, citizenship, and slavery?

5. LOCHNER V. NEW YORK 198 U.S. 45 (1905)

WHAT WAS THIS CASE ABOUT?

The story. In 1897 the legislature of the state of New York passed a law that regulated

working conditions. One part of the law said that no employee in a bakery could be required, or allowed, to work more than 60 hours in one week. Why was such a law needed? The legislature thought that bakery workers and employers were not on an equal footing. Bosses could make workers agree to work long hours because the workers were afraid of losing their jobs. Even if workers wanted to work such long hours, the legislature thought that they should not be allowed to do so. Bakery work is very hard and very hot, and working long hours would hurt the workers' health. Some people also thought that laws limiting the hours of labor would make workers' family lives better. They reasoned that with shorter hours of labor, workers could spend more time with their families.

Some bakery owners were convicted of violating the law. One bakery owner named Lochner appealed his conviction. He said that the law was unconstitutional because it took away his liberty to make a contract about hours of labor with his employees. Lochner said that liberty of contract is promised by a clause in the 14th Amendment. The clause says that no state may "deprive any person of life, liberty, or property, without due process of law." From *Dred Scott v. Sandford* you remember that nearly identical wording is found in the Fifth Amendment. The difference is that in the Fifth Amendment, the wording applies to federal laws, while in the 14th Amendment, it applies to state laws. In 1905 *Lochner v. New York* reached the Supreme Court.

The question. Is it a violation of the 14th Amendment for a state to limit the number of hours that employees may be required or permitted to work?

The issues. As the Court explained, state governments have a general power to make regulations that support the safety, health, morals, and general welfare of their citizens. This power is called the "police power" because one of the meanings of the word *police* is "regulation." (*Police* need not always refer to law-enforcement officers.) New York's 1897 law about work in bakeries is a good example of the use of the police power. As you saw earlier, the law was intended to protect workers' health by limiting the time they could spend at hard, hot labor. Many people

also saw it as protecting morals by allowing workers to spend more time at home with their families. We know that the Constitution puts limits on various powers of the federal government. The basic issue of this case, however, is how the Constitution might limit the police power of the state governments.

Where in the Constitution would one look to find such limits? Several limits on the states are contained in various amendments, but the most general limit is the "due process" clause of the 14th Amendment. Read the wording of the clause again very carefully:

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

In order to apply this clause to the New York bakery law, the Supreme Court had to make two judgments. One was deciding which freedoms are meant by the word *liberty*. Does the meaning include liberty of contract or not? The other was deciding just what is promised by the guarantee of "due process of law." Does this phrase merely limit how laws may be made and enforced, or does it also limit what they say?

How do you think the bakery owner, Lochner, wanted the Court to make these two decisions?

HOW WAS THE CASE DECIDED?

In an opinion written by Justice Rufus Wheeler Peckham, the Court ruled that the New York law limiting the hours of labor in bakeries was unconstitutional.

WHAT DID THE COURT SAY ABOUT GOVERNMENTAL POWERS?

"This court," said Justice Peckham, "has recognized the existence and upheld the exercise of the police power in many cases." He argued, however, that the New York legislature had gone too far. The problem with the New York law was that its interference with liberty of contract was improper.

Justice Peckham did not mean that the Constitution forbids all interference with liberty of contract, no matter how slight, no matter how good the reasons for it. In fact, he stressed that the Court had approved a Utah law that was somewhat similar to the New York law. The Utah law said that nobody in

an underground mine could work more than eight hours a day “except in cases of emergency, where life or property is in imminent danger.” Such uses of the police power, he said, were “fair, reasonable, and appropriate.” They regulate liberty without taking it away. By contrast, New York’s interference with liberty of contract was “unreasonable, unnecessary, and arbitrary [not decided by reason or principle].” He argued that New York’s law had nothing to do with safety, morals, or general welfare, and he said that the law was not really necessary to protect health.

WHAT IMPLICATIONS DID THIS CASE HAVE FOR THE FUTURE?

As new cases come up the members of the Supreme Court try to settle them by using the same principles that they have developed in earlier cases. What principles did this case test?

- To what extent does the word *liberty* in the 14th Amendment apply to liberty of contract?
- Does the 14th Amendment’s promise of “due process of law” limit not only how laws are made and enforced but also what they say? If they interfere with liberty—in this case, liberty of contract—the interference must be “fair, reasonable, and appropriate.” How might this interference be judged?

Even though the Court tries to use the same principles over and over, sometimes its members change their minds about controversial issues. An opinion expressed by only one justice today might become the opinion of the majority 10, 20, or 30 years later.

Four justices dissented, or disagreed with the ruling. The most interesting dissenting opinion was written by Justice Oliver Wendell Holmes. “This case,” he said, “is decided upon an economic theory which a large part of the country does not entertain,” the theory of *laissez-faire*. According to this theory a person has “liberty to do what he likes so long as he does not interfere with the liberty of others to do the same.” (The opposite theory is called *paternalism*, which says that at least in some cases, people may be kept from hurting themselves.) He went on to say that

he thought that the decision was for the citizens and their legislators, not for judges. His only duty as a judge was to see if the theory was in the Constitution, and “a Constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of laissez-faire.” He said that the members of the Court were acting as though the word *liberty* meant whatever opinions the justices happened to hold themselves.

Thousands of people agreed with Justice Holmes. State legislatures had begun to make more and more regulations to protect workers. They were angry that the Court had called such a law “unreasonable, unnecessary, and arbitrary.”

Over the years the membership of the Supreme Court changed. Some of the new members had views different from those held by the Court in 1905; others held the same views but later changed their minds. In the 1940s the Court began to reverse all of the precedents it had set in cases like *Lochner v. New York*. By the 1960s this process of reversal was complete. As Justice Hugo Black said in a 1963 case called *Ferguson v. Skrupa*,

“The doctrine that prevailed in *Lochner* . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.”

BRAIN TEASERS

1. In your own words, write a definition of the words *laissez-faire* and *paternalism*. How did the opinion of the Court reflect *laissez-faire*? How did the opinion of the New York legislature reflect *paternalism*?
2. Justice Holmes said that choosing between *laissez-faire* and *paternalism* was a decision for the public and its legislators, not the decision of judges. You are a member of the public. Do you approve of the New York bakery law? Explain your answer.

3. What part of the Constitution was used in *Dred Scott v. Sandford* and in *Lochner v. New York*? What does this part of the Constitution state?

6. SCHENCK V. UNITED STATES

249 U.S. 47 (1919)

WHAT WAS THIS CASE ABOUT?

The story. In the early years of the twentieth century, most people did not want to hear the government criticized. There were several reasons for this attitude. One reason was a fear of political **radicalism**. This fear had many causes, but it was inflamed by the assassination of President McKinley in 1901. Another reason was fear of enemy sympathizers, which began with America's entry into World War I. In 1917 Congress passed a law called the Espionage Act. Among other things, the law said that during wartime obstructing the draft and trying to make soldiers disloyal or disobedient were crimes. Almost 2,000 people were accused of violating this law and were put on trial.

Charles Schenck was against the war, and he decided to do something about it. He mailed pamphlets to men who had been drafted into the armed forces. These pamphlets said that the government had no right to send American citizens to other countries to kill people. They said that to be drafted was to be enslaved and that slavery had been abolished by the 13th Amendment. They also said that the war was a plot by rich people on Wall Street. Finally, they urged soldiers not to give in to the government's bullying.

The government responded by accusing Schenck of violating the Espionage Act. It said that Schenck's pamphlets were intended to weaken the loyalty of soldiers and to obstruct military recruiting. Schenck answered the charge by saying that the Espionage Act was unconstitutional. He said that it broke the First Amendment's promise that "Congress shall make no law . . . abridging the freedom of speech." After working its way through the federal courts, the case was judged by the Supreme Court in 1919.

The question. Is it a violation of the First Amendment for Congress to make a law that

would punish a person for saying to soldiers, during wartime, things such as Schenck said?

The issues. Just what is "freedom of speech"? Does this phrase mean permission to use words in any way at all—liberty to say anything to anyone, at any time, in any place, and in any way? For instance, could a reporter write false statements about a person just because the reporter did not like that person? Nobody believes that this use of speech is what the writers of the First Amendment meant when they promised freedom of speech. But does the First Amendment allow Congress to limit free speech in any way it pleases? If the First Amendment did allow this, political criticism, debate, and discussion would be impossible. The writers of the amendment wanted to liberate political speech, not to muzzle it. In *Schenck v. United States*, the Supreme Court had to decide what kinds of limits on speech should be allowed without destroying what we mean by the word *freedom*.

HOW WAS THE CASE DECIDED?

In a court opinion written by Justice Oliver Wendell Holmes, the Supreme Court unanimously upheld (supported) Schenck's conviction, saying that it did not violate his First Amendment right to free speech.

WHAT DID THE COURT SAY ABOUT CONSTITUTIONAL RIGHTS?

Justice Holmes admitted that "in many places and in ordinary times" Schenck would have had a right to say everything that he said in his pamphlets. However, he said that how far a person's freedom of speech extends depends on the circumstances. "The most stringent protection of free speech," he said, "would not protect a man in falsely shouting fire in a theatre and causing a panic." Justice Holmes compared that circumstance to living in a nation at war. "When a nation is at war," he said, "many things that might be said in time of peace are 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." During war, he thought, the government certainly has the power to prevent obstructions to recruitment. Therefore, it also

has the power to punish someone who uses words that are proven to cause such obstructions. "The question in every case," said Holmes, "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."

WHAT IMPLICATIONS DID THIS CASE HAVE FOR THE FUTURE?

Look again at the last sentence of the last paragraph. Justice Holmes expresses what is called the "clear and present danger test." This test has been used in many other cases. A famous lower court judge named Learned Hand once said that whenever the government claims that someone's speech poses a danger, judges must consider both the seriousness of the danger and the likelihood of it actually happening. For instance, suppose someone makes a speech calling the government a dictatorship and hinting that revolution would be a good idea. Overthrow is the most serious evil that can happen to the government. But that person may not be punished for his words unless they really do make this danger likely.

A number of judges have disapproved of the clear and present danger test. Remember, sometimes dissenters succeed in persuading other members of the Court to change their minds. Judge Hand himself once wrote that he was not "wholly in love" with the test. His complaint was that it made the decision about when speech may be limited "a matter of degree." He meant that it was unfortunate that this particular aspect was open to changing interpretation. Each case could result in a contradictory decision!

The most well-known opponent of the clear and present danger test was the late Justice Hugo Black. He objected to the very idea that the First Amendment's promises of freedom could be "balanced" against other governmental goals (such as wanting to prevent obstructions to recruiting soldiers). He thought that this balancing view of free speech destroyed freedom. Instead he proposed another approach to the First Amendment, called the absolutist view of free speech. People who support this view believe that the promise of freedom means that speakers may never be punished for what they say. They may, however, be punished for the place, time, or way

in which they say it. A reporter could not be punished for telling a friend false statements about another person, but the reporter could be punished for writing the false statements in a newspaper article.

BRAIN TEASERS

1. Explain the balancing view of the First Amendment and the absolutist view of the First Amendment in your own words.
2. If the Supreme Court had taken an absolutist view of the First Amendment, could it still have upheld Schenck's conviction? Explain your answer.
3. Choose between the balancing view and the absolutist view of the First Amendment. Use your imagination to defend the view you choose against the criticisms that would be made by those who choose the other view.

7. EVERSON V. BOARD OF EDUCATION and AGUILAR V. FELTON

330 U.S. 1 (1947) and 473 U.S.
402 (1985)

WHAT WERE THESE CASES ABOUT?

The stories. Both of these cases concern government, religion, and public schools. The cases are discussed together because they show the extreme difficulty the Supreme Court has had in making consistent decisions in matters of church and state. The two stories have similar beginnings. As you will see in the next section, however, they have very different middles and ends.

The first case, *Everson v. Board of Education*, was about a school district in Ewing, New Jersey, that did not have any school buses. Children rode back and forth to school on regular city buses. The school board decided to reimburse, or pay back, parents for the money their children spent on bus fares. Because taxes were paid by all parents, all parents were reimbursed (parents who sent their children to public schools as well as parents who sent their children to religious schools). A taxpayer sued the school board and asked the courts to order that parents who sent their children to religious schools no longer be reimbursed.

The second case, *Aguilar v. Felton*, was about New York City's use of a federal grant that provided money to assist poor, educationally deprived children. The city used part of the money to pay city teachers to give remedial education to children who attended religious schools. To make sure that government did not get too involved with religion, the city also assigned supervisors to drop in on the remedial teachers unannounced. The supervisors were supposed to make sure that the remedial teaching activities did not involve religion. A taxpayer sued the city and asked the courts to order this use of the federal grant money stopped.

The questions. In both cases the taxpayers who sued said that the policies they opposed violated the "establishment clause" of the First Amendment. Therefore, the questions in the two cases were almost identical. *Everson* asked if it was a violation of the establishment clause to reimburse not only public school parents but also parents of religious-school students for bus fares spent by their children to and from school. *Aguilar* asked if it was a violation of the establishment clause to pay the salaries of public employees who taught in religious-school classrooms.

The issues. The establishment clause reads, "Congress shall make no law . . . respecting an establishment of religion." *Respecting* means "about." *Establishment of religion* means, literally, "official church." Narrowly viewed, then, the establishment clause means "Congress may make no law . . . about an official church." However, some people believe that the establishment clause was intended to ban more than an official church. They believe that it was intended to ban any contact between government and religion at all, no matter how slight. Broadly viewed, it might even mean that the slogan "In God We Trust" should be removed from coins and that Congress should stop opening its sessions with prayer.

What these two cases required the Court to do was decide if the true meaning of the establishment clause was the narrow meaning, the broad meaning, or something else in between.

You may wonder how the First Amendment can come into play in these two cases at all. After all, the First Amendment mentions only

Congress, not state or local governments. However, it was extended to state and local governments by the 14th Amendment.

HOW WERE THE CASES DECIDED?

The results of these two cases sharply differed. In *Everson* the Supreme Court ruled that the school authorities had not violated the establishment clause. In *Aguilar* it ruled that they had.

WHAT DID THE COURT SAY ABOUT CONSTITUTIONAL RIGHTS?

The opinion in *Everson* was written by Justice Hugo Black. He accepted Thomas Jefferson's view that the establishment clause builds a "wall of separation between church and state." However, he did not think that the reimbursement plan broke down that wall. In his view the plan was simply a way to further the government's interest in the education of all children. Justice Black suggested that refusing to allow reimbursement of bus fares for religious-school students was like refusing to allow policemen to protect religious-school students from traffic, refusing to allow firemen to put out a fire at a religious school, or refusing to allow religious schools the use of public highways and sidewalks. If the state provides such services at all, they are due to all citizens equally.

Later, in a 1970 case,* the Court admitted that its language about a "wall of separation" was misleading. "The line of separation," it said, "far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." In the meantime, the Court worked hard to clear up just what the establishment clause really means. Still later, in a 1971 case,** the Court said that every law or government policy must meet three tests. First, it must have a secular (nonreligious) purpose. Second, its main effect must neither help nor hurt religion. Finally, it must not cause the government to be excessively entangled, or involved, with religion. If the law or policy could meet all three tests—purpose, effect, and entanglement—the Court said it would not violate the establishment clause.

Now let's look at *Aguilar*, in which the three tests were applied to New York City's

remedial education program. Justice Brennan, who wrote the opinion, admitted that the program had a secular purpose. This purpose was to help poor, educationally deprived schoolchildren, regardless of religion. He also agreed that the program neither hurt nor helped religion. As mentioned above, New York had made sure of this by assigning supervisors to drop in and check on the remedial teachers unannounced. However, said Justice Brennan, even though this supervision helped the program pass the second test, it made it fail the third test! He said the supervision was an "excessive entanglement" of public authorities with religious institutions.

WHAT IMPLICATIONS DO THESE CASES HAVE FOR THE FUTURE?

These two cases illustrate two different points in the development of the same view of the establishment clause. Yet their outcomes are completely different. Even some of the members of the Supreme Court say that the Court's decisions based on the establishment clause have zigzagged. Some members of the Court want to keep the purpose-effect-entanglement test as it is. Other members say they want to keep the test, but they would like to see some changes made in it. One member of the Court thinks that the test should be discarded completely. We cannot be sure what will happen in the future, but an important change in the Court's view of the establishment clause seems more and more likely.

BRAIN TEASERS

1. Why do you think that the Supreme Court decided that separation between church and state is more like a blurred line than a wall? Explain your reasoning.
2. In your own words, explain the three parts of the purpose-effect-entanglement test.
3. Remember that in *Aguilar v. Felton* what New York did to pass the second part of the purpose-effect-entanglement test was seen as making it fail the third part of the purpose-effect-entanglement test. Several members of the Court dissented angrily. They said that this ruling set up a no-win situation. Do you agree with the ruling or with the dissenters? Why?

* *Walz v. Tax Commission* ** *Lemon v. Kurtzman*

8. REYNOLDS V. UNITED STATES and WISCONSIN V. YODER

98 U.S. 145 (1879) and 406 U.S. 205 (1972)

WHAT WERE THESE CASES ABOUT?

The stories. Like the last two cases you studied, these two cases are about religion. But these cases concern a different part of the Constitution and raise very different issues.

Reynolds v. United States is a simple story. As in the states, the law in early Utah Territory made it a crime for a man to have more than one wife at the same time. This practice is called bigamy. However, Utah Territory had been settled mostly by members of the Church of Jesus Christ of Latter-Day Saints, called Mormons. At that time Mormons believed that God permitted men to have several wives. In fact, they thought that when circumstances permitted, marrying several wives was a religious duty. When a Mormon named George Reynolds was convicted of bigamy, he appealed, saying that his constitutional right to practice his religion had been taken away.

The story in *Wisconsin v. Yoder* is equally simple and very similar. Several communities of people who practice the Amish religion live in Wisconsin. The Amish believe that the world is ungodly and morally corrupt. To please God they separate their communities from the world as much as possible. For example, they do not want their children forced to attend public high schools, where they would be exposed to worldly influences that might tempt them to accept wrong beliefs and bad ways of life. But Wisconsin law requires children to be educated for a certain number of years. When Yoder and several other Amish parents kept their children out of high school, they were charged with violating the school attendance law. Convicted, they made the same appeal as Reynolds. The law, they protested, took away their constitutional right to practice their religion. They said that obeying the law would endanger their own salvation as well as the salvation of their children.

The questions. In each of these cases the defendants said that the laws under which they had been convicted violated the "free exercise clause" of the First Amendment.

Therefore, the questions in the two cases were almost identical. *Reynolds* asked if it was a violation of the free exercise clause to punish a person for breaking a bigamy law that goes against Mormon beliefs. *Yoder* asked if it was a violation of the free exercise clause to punish a person for breaking a school attendance law that goes against Amish beliefs.

The issues. If you read the First Amendment carefully, you will see that it says not just one thing about religion but two. Its wording is, "Congress shall make no law . . . respecting an establishment of religion, or prohibiting the free exercise thereof." You studied the establishment clause in the last two cases. The free exercise clause, though, adds a new dimension to the Supreme Court's cases.

A paraphrase of the free exercise clause might be "Congress is not allowed to make laws that stop people from freely practicing their religions." But just what does this clause mean? Surely it means that government should not stop people from believing what their religions teach. But perhaps it also means that government should not stop people from acting as their religions teach. The issue that the Court had to decide, then, was if the free exercise clause was not only about belief but also about action.

HOW WERE THE CASES DECIDED?

The results of the two cases before us were very different. In *Reynolds* the Supreme Court ruled that Utah Territory's bigamy law did not violate the free exercise right of Mormons. In *Yoder* it ruled that Wisconsin's school attendance law violated the free exercise right of the Amish.

WHAT DID THE COURT SAY ABOUT CONSTITUTIONAL RIGHTS?

Chief Justice Morrison Remick Waite wrote the Court's opinion in *Reynolds*. As you read, the issue the Court had to decide was if the free exercise clause is not just about belief but also about action. The chief justice's opinion was simple and clear: the free exercise clause is only about belief. So the fact that George Reynolds *believed* God wanted him to have several wives was not the state's concern. On the other hand, if he *acted* on that belief the government could punish him.

Some people objected that this opinion put

the government above God. However, Chief Justice Waite had an answer to such an objection. He said that if the free exercise clause applied to action as well as belief then nothing at all could be forbidden. For instance, you know that it is against the law to commit murder. Somebody could say, "That law takes away my constitutional rights because my religion requires human sacrifice."

In *Yoder v. Wisconsin* Wisconsin authorities urged the Court to distinguish between belief and action just as former Chief Justice Waite had 100 years earlier. Then Yoder would have been in the wrong. Speaking for the Court, Chief Justice Warren Burger refused. At least in this case, he said, "belief and action cannot be confined in logic-tight compartments." Instead of reasoning like Chief Justice Waite, Chief Justice Burger followed up something that the Court had said in 1952.* The free exercise clause, it had remarked, shows that "we are a religious people whose institutions presuppose a Supreme Being. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man make necessary." Chief Justice Burger thought this statement meant that wherever possible, the government should "accommodate," or allow for, the various ways of life in which people of different religions believe.

In his opinion Chief Justice Burger expressed a new principle. Let's look at the three parts of the principle. First, the actions that the government wants to forbid must be interfering with what the government is doing to achieve some purpose. Second, the government's purpose must be an extremely important one. Third, what the government is doing to achieve the purpose must be the only way it can be achieved. Now, let's apply this principle to *Wisconsin v. Yoder*:

- What purpose was the Wisconsin government trying to achieve? (To educate children well enough to play their roles as citizens)
- Was this purpose extremely important? (The chief justice agreed that it was.)
- How was Wisconsin trying to achieve it? (By making all children go to high school)
- But was this the only way the purpose could be achieved? (The chief justice said it was not. The Amish put their teenage children

* *Zorach v. Clauson*

to work in the community. In this way they "learned by doing." Chief Justice Burger said this type of education seemed to work well enough. For evidence he said that the Amish had shown themselves to be good citizens. Therefore, he said, the Constitution does not allow Wisconsin to force Amish parents to send their children to public high school.)

WHAT IMPLICATIONS DO THESE CASES HAVE FOR THE FUTURE?

First, you know that for future cases, the idea that the Constitution protects only religious belief and not religious action has been rejected. Second, you know that to decide when religious conduct must be accommodated and when it may be forbidden, the Supreme Court has a new principle.

Will the Court keep this new principle, or will it change its interpretation? We cannot predict the answer. We can, however, get some hints about the future by thinking about questions that the new principle does not answer. One such question is, "What is a religion?" Some members of the Supreme Court were very upset about Chief Justice Burger's opinion. They said he seemed to think that a **sect** counts as a religion only if its members are considered good citizens. This question will have to be faced sometime in the future.

Another clue that there may be a new interpretation is that the new principle uses the balancing test. To apply the principle, the court must balance the right to free exercise of religion against other important government purposes. As you read in the lesson on *Schenck v. United States*, balancing tests are controversial. Saying that a right must be balanced against other purposes means admitting that the right is not absolute. Some judges believe that if a right is not absolute, it is not really a right at all.

BRAIN TEASERS

1. What do you think the First Amendment means by the word *religion*? Explain your reasoning.
2. Do you agree with Chief Justice Burger that free exercise rights can be outweighed by extremely important government purposes (such as national security or protecting people from harm), or do you

think nothing is important enough to outweigh free exercise rights? Support your answer.

3. Make a list of other religious practices that people might want the government to accommodate. Here are some examples to get you started: refusal to serve in the armed forces and refusal to work on the Sabbath. Imagine that you are the new chief justice of the Supreme Court. To each practice on your list, apply the principle developed by Chief Justice Burger in *Wisconsin v. Yoder*. Do you think that the government should accommodate the practice? Explain your reasoning.

9. YOUNGSTOWN SHEET & TUBE COMPANY V. SAWYER

343 U.S. 579 (1952)

WHAT WAS THIS CASE ABOUT?

The story. The time was 1952. Far away in Korea, American forces were at war. At home factories were working hard to supply them with weapons. However, labor and management in the steel industry were having a little "war" of their own. The time had come to negotiate a new contract between the steel companies and the steel workers' union. Even though negotiators from both sides had been meeting for weeks, they had been unable to agree. Twice the government tried to help the two sides come to an agreement, but still no contract was in sight. Frustrated, the union representatives set a deadline. They said that if no agreement was reached by midnight April 9, a nationwide strike would begin one minute later.

A few hours before the strike was to begin, President Truman ordered Commerce Secretary Charles S. Sawyer to take control of most of the steel mills and keep them running. Sawyer immediately issued orders to the steel companies. Troops were sent into the mills to take the workers' places. In the morning the president told Congress what he had done. Congress did not take any action. On several previous occasions when Congress had made laws about labor disputes, the idea of giving

the president power to seize companies had been considered. It had always been rejected.

The steel companies obeyed the commerce secretary's orders, but they protested. Saying that neither Congress nor the Constitution gave the president power to seize the steel mills, they asked the courts to declare the orders of Truman and Sawyer invalid. Because the United States was in the midst of a war, the Supreme Court "cut some red tape" (skipped over normal procedures) and heard the case in a very early stage of legal proceedings.

The question. Justice Hugo Black wrote the Court's opinion. As he put it, the question before the Court was "Is the seizure order within the constitutional power of the president?"

The issues. Remember that in *McCulloch v. Maryland* the Court ruled that Congress has not only the powers that are explicitly listed in the Constitution but also powers that are needed to carry out the listed powers. President Truman and Secretary Sawyer made a similar claim. They admitted that in the part of the Constitution where the president's job is described, no power to seize industrial property is mentioned. But the Constitution does make the president the chief executive of the United States as well as commander in chief of the armed forces. Truman and Sawyer said that a broad power to deal with emergencies was included in the very idea of a chief executive as the armed forces commander in chief. Because *inherent* means "included in the very idea of," they called it an *inherent power*. They said that this inherent power included the power to seize industrial property in certain emergency situations. The Court had to decide if this line of reasoning was correct.

HOW WAS THE CASE DECIDED?

In an opinion written by Justice Black, six of the nine Justices ruled that the seizure order was unconstitutional and must be canceled.

WHAT DID THE COURT SAY ABOUT GOVERNMENTAL POWERS?

First, Justice Black said that the seizure of the mills could not be justified by the fact that the

president is commander in chief of the armed forces. Truman and Sawyer had argued that courts often upheld broad powers for military commanders at the scene of battle. The Court said that even though a war was going on, the United States was not a scene of battle.

Second, Justice Black said that the seizure of the mills could not be justified by the president's job as chief executive. An executive is not a lawmaker. According to the Constitution, Congress is to make laws; the executive branch is to "execute" them, or carry them out. Whether or not seizure of industrial property is a good way to deal with labor disputes that stop production is a matter to be settled by law and not by executive action.

The president's order, Justice Black remarked, was written in much the same way that laws are written. He said, however, that being written like a law did not make it a law. "The president's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by Congress." The action could not be permitted.

WHAT IMPLICATIONS DOES THIS CASE HAVE FOR THE FUTURE?

Did you notice that the Court's opinion did not make a flat statement that there is no such thing as an inherent power? Asking whether there is any such thing is easy.

Answering the question, however, is not so easy. Each of the six justices in the majority reasoned in a slightly different way. Justice Black's opinion was very brief because it included only what all six could agree to. The reason he did not say that there is no such thing as an inherent power is that not all of the six justices were ready to agree.

One member of the majority, Justice Tom Campbell Clark, said that the Constitution gives the president broad power in times of deep national emergency, whether this power is called "inherent," "moral," "implied," "emergency," or something else. He thought that if Congress had never said anything about how emergencies are to be handled, the president would have had to use his own judgment. Clark believed the key fact was that Congress had said quite a bit about how emergencies are to be handled. Therefore, the

president had been wrong to take the decision into his own hands. The three dissenting justices said that there is such a thing as an inherent power. They disagreed, however, with Justice Clark's view that it had not been properly used in this case.

The Court's argument against President Truman's seizure of the steel mills tells us something about the future. It demonstrates the Court's determination to uphold the separation of powers. Congress is to set policy; the president is to carry it out. The Court's inability to agree to a flat statement about whether or not there is such a thing as an inherent presidential power tells us something about the future. It tells us that until the Court can agree, this issue is likely to come up again and again in different kinds of situations.

BRAIN TEASERS

1. This case was started by the steel companies, so you know that management disapproved of the seizure order. How do you think the steel workers' union reacted to the seizure order? Why?
2. Remember why the Court said that President Truman's role as commander in chief of the armed forces did not justify the seizure order: the place where the seizures took place was not the scene of battle. How might Truman have replied to this argument?
3. How does this case illustrate our system of checks and balances?

10. *PLESSY V. FERGUSON* and *BROWN V. BOARD OF EDUCATION*

163 U.S. 537 (1896) and 347 U.S. 483 (1954)

WHAT WERE THESE CASES ABOUT?

The stories. These two cases illustrate a profound change in the legality of racial segregation.

Plessy v. Ferguson begins with a law passed by the Louisiana legislature in 1890. The law required all railway companies in the state to provide "separate but equal" accommodations for white and African American passen-

gers. A group of people who did not think the law was fair recruited a young man named Homer Plessy to get arrested on purpose in order to test the law. Homer Plessy entered a train and took an empty seat in an all-white coach. The conductor tried to make him move to an all-black coach. When Plessy refused he was arrested by a police officer and put in jail. In his defense he said that the 1890 law was unconstitutional. The case eventually came to the United States Supreme Court and was decided in 1896.

More than 50 years later an African American named Oliver Brown moved with his family into a white neighborhood in Topeka, Kansas. The Browns assumed that their daughter, Linda, would attend the neighborhood school. Instead, the school board ordered her to attend a distant all-black school that was supposedly "separate but equal." Saying that school segregation violated the 14th Amendment to the Constitution, Mr. Brown sued the school board. He asked the courts to order that his daughter be permitted to attend the neighborhood school. Similar cases were developing in South Carolina, Virginia, and Delaware. The Supreme Court's decision in *Brown v. Board of Education* settled all four cases at once.

The question. The question raised by the Court was the same in both cases. In one case the question was applied to transportation while in the other it was applied to public education. That question was: Do racially segregated facilities violate the "equal protection" clause of the 14th Amendment?

The issues. The 14th Amendment is one of several amendments that were passed soon after the Civil War to guarantee the freedom of African Americans and to protect them from unfair treatment. The wording of the equal protection clause is: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." But just what does this wording forbid? Louisiana authorities in *Plessy* said that it did not forbid racial segregation in railway carriages. They argued that separate railway carriages for African Americans and whites could be equal. For instance, they could be equally clean and equally safe. Kansas authorities in *Brown* said much the same thing. They claimed that their all-black and all-white schools were equal in the skill

of their teachers, the quality of their buildings, and so on.

In the days of racial segregation the claim that segregated facilities were equal in tangible, or measurable, features was almost always a terrible lie. Railroad companies would reserve only the oldest and most worn cars for African Americans. School boards often would spend three times as much money for each white student as for each African American student. But the issue facing the Court went much deeper. Even if things were made equal in racially segregated facilities, was that enough to satisfy the requirement for "equal protection of the laws"? Or was there something inherently unequal about segregation?

HOW WERE THE CASES DECIDED?

In *Plessy v. Ferguson*, decided in 1896, the Court ruled that the 14th Amendment's equal protection clause allows racial segregation. In *Brown v. Board of Education*, decided in 1954, the Court unanimously reversed course, ruling that the equal protection clause does not allow racial segregation.

WHAT DID THE COURT SAY ABOUT CONSTITUTIONAL RIGHTS?

Justice Henry Billings Brown wrote the Court's opinion in *Plessy*. He admitted that the purpose of the 14th Amendment was "to enforce the absolute equality of the two races before the law." But then he said that this statement meant political equality, not social equality. In his view, neither African Americans nor white people wanted the races to mingle. He knew that an objection to his position could be made. Somebody might say that even if the facilities offered to African Americans and whites were equal, separation of the races themselves implied that African Americans were inferior to whites. However, Justice Brown said that this objection was a "fallacy," or false belief. If any African American people thought enforced racial segregation stamped them with a "badge of inferiority," he said, the fault was not in the law but in their attitude.

In *Brown* the Court's opinion was written by Chief Justice Earl Warren. It is as different from the *Plessy* opinion as night is from day. Separation of African American schoolchildren from white schoolchildren of the same

age and ability, he said, "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." He said that when racial segregation is required by law, the harm is even greater. It makes no difference that "the physical facilities and other 'tangible' factors may be equal," he said. The inequality is inherent in racial segregation itself. Enforced separation of the races in public education is unconstitutional. It is not equal protection and never can be equal protection.

WHAT IMPLICATIONS DID THESE CASES HAVE FOR THE FUTURE?

In *Brown v. Board of Education* the Court did not say that the "separate but equal" doctrine had no place anywhere. It said that the "separate but equal" doctrine had no place "in the field of public education." Even though this statement was limited, it had a powerful impact on future cases. Today, no judge would ever suggest that what is "separate" can be "equal." *Plessy v. Ferguson* has been completely discarded.

Taken together, *Plessy* and *Brown* show the moral power of protest as well as the flexibility of the Constitution. The Constitution contains legal principles whose interpretations may change as American society changes. The decision in *Plessy* was not unanimous. An emotional dissenting opinion was written by Justice John Marshall Harlan. Even though Justice Harlan came from a family that had once owned slaves, he had come to understand the evil of enforced racial segregation. "What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between the races," he asked, than laws that assume that African American people are inferior. In words that ring like a liberty bell, he said that "in the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among its citizens."

It took more than 50 years, but eventually Justice Harlan's dissent became the law of the land.

BRAIN TEASERS

1. In 1896 Justice Harlan said that enforced racial segregation was unequal even when the public facilities provided for African Americans and whites were the same. In 1954 the entire Supreme Court said the same thing. Explain their arguments in your own words.
2. Justice Brown seemed to think that enforced racial segregation *reflected* certain feelings African Americans and whites had for each other. Justice Harlan, by contrast, thought that enforced racial segregation would *cause* African Americans and whites to have certain feelings for each other. Think about this disagreement, and then explain what you think it means.

11. *LOVING V. VIRGINIA*

388 U.S. 1 (1967)

WHAT WAS THIS CASE ABOUT?

The story. As late as the 1960s, 16 states had laws that forbade and punished marriages between people of different races. One of these states was Virginia. The Virginia law banned all interracial marriages in which one of the partners was white. For instance, a marriage between an African American and a Cherokee Indian would have been legal.

Yet it is hard to tell people with whom to fall in love. This case is about the Lovings, an African American woman and a white man. Because they lived in Virginia, they had to travel to the District of Columbia to get married. When they returned to Virginia to live, they were arrested. The Virginia court rejected their claim that the law was wrong. Unwilling to give up, Mr. and Mrs. Loving appealed to the federal courts, saying that the Virginia law violated the 14th Amendment. Their case was decided by the Supreme Court in 1967.

The question. Did Virginia's law against certain kinds of interracial marriages violate the 14th Amendment?

The issues. The meanings of two different clauses of the 14th Amendment were argued in this case. You have learned about both of these clauses in previous lessons: the equal protection clause and the due process clause.

To prove that the Virginia law deprived citizens of equal protection, it would not be enough to point out that the law classified citizens according to race. The Court would have to look at the reason for this racial classification. Was the reason to put people of one race above another? For instance, suppose scientists discover a new disease that attacks only white-skinned people, and researchers have developed a shot that keeps people from getting the disease. Virginia might pass a law requiring white-skinned schoolchildren to get the shot but not requiring other schoolchildren to get it. Obviously, this law classifies citizens by race. However, its purpose is not to put one race above another. Therefore, this law would not violate the equal protection clause.

Now remember the wording of the due process clause. It says that no state may take away its citizens' life, liberty, or property without due process of law. The issue here is which freedoms are included in the word *liberty*. In order to prove that the Virginia law violated the due process clause, it would not be enough to point out that it took away the freedom to marry a person of one's choice. The Court would have to consider whether or not this is one of the liberties to which the due process clause refers. For instance, suppose Virginia passes a law that imposes severe punishments for driving a car while under the influence of alcohol. Obviously, this law takes away the freedom to engage in drunken driving. However, drunken driving is not one of the liberties to which the due process clause refers. Therefore, this law would not violate the due process clause.

HOW WAS THE CASE DECIDED?

In an opinion written by Chief Justice Earl Warren, the Supreme Court unanimously ruled that Virginia's law against interracial marriages violated the 14th Amendment.

WHAT DID THE COURT SAY ABOUT CONSTITUTIONAL RIGHTS?

Remember that in order to decide if the Virginia law violated the equal protection clause, the Supreme Court had to look at the reasons for the law. These reasons were not hard to find because they had been stated, and defended, by the Virginia state court. They were

to "preserve the racial integrity" of Virginia citizens, and prevent the "corruption of blood" and the "obliteration of racial pride." Chief Justice Warren said that these statements were "obviously an endorsement of White Supremacy." Another fact demonstrating that Virginia wanted to put whites above people of other races was that its law did not punish all interracial marriages but only interracial marriages involving whites. Putting one race above another is exactly the kind of purpose the equal protection clause was meant to prevent.

Now remember that in order to decide whether the Virginia law violated the due process clause, the Supreme Court had to decide whether or not freedom to marry a person of one's choice is one of the liberties to which the clause refers. Chief Justice Warren said that it was. "Marriage," he insisted, "is one of the 'basic civil rights of man.'" Surely, he said, to take away this "fundamental freedom" for such a flimsy reason as a racial classification violates the promise of due process of law.

WHAT IMPLICATIONS DOES THIS CASE HAVE FOR THE FUTURE?

The most obvious thing that this case illustrates is the Court's determination to wipe out every trace of racial discrimination in the laws. In this way it continued the revolution begun in *Brown v. Board of Education*.

However, that is not all the case tells us about the future. The case deals not only with race but with marriage. State marriage laws often include various kinds of restrictions on who may marry. Restriction according to race, obviously, is now ruled out. But what about other kinds of restrictions? When the Court called marriage a "basic civil right of man" and a "fundamental freedom," it did not mean that no other kinds of restrictions could stand. However, using this language was a hint that if other kinds of restrictions are challenged in the courts, states will have to present very good reasons for them.

BRAIN TEASERS

1. What is the main purpose of the equal protection clause? How was the equal protection clause used in this case?

2. When the Court called marriage a "basic civil right of man" and a "fundamental freedom," it did not mean that no limitations on who may marry could stand. Can you think of any limitations on who may marry for which a good reason can be given? Explain your answer.
3. What other "fundamental freedoms" do you think the due process clause might protect? Why?

12. *GIDEON V. WAINWRIGHT* 372 U.S. 436 (1963)

WHAT WAS THIS CASE ABOUT?

The story. Clarence Earl Gideon was accused of breaking and entering into a Florida poolroom and stealing. The theft in this case was minor, but breaking and entering is a major crime. When Gideon's case came to trial he could not afford to hire a lawyer, and he asked that the court supply him with one for free. The judge refused. Gideon did his best to conduct his own defense, but he was found guilty. While he was in prison, Gideon spent hours studying law books. Using only what he learned in the law books, he wrote a legal document, called a *writ*, asking the United States Supreme Court to review his case. He claimed that by refusing to appoint a lawyer to help him, the Florida court had violated rights promised him by the Sixth and 14th Amendments. The Court issued its ruling in 1963.

The question. Is it a violation of the Sixth or 14th Amendment to deny a poor person accused of a major crime the free assistance of a lawyer?

The issues. The Sixth Amendment promises certain rights to people accused of crimes. One of the promises is that "the accused shall enjoy the right . . . to have the Assistance of Counsel [a lawyer] for his defense." By itself this amendment applies only to people on trial in federal courts. Thus, federal law required that poor people be provided with free lawyers in federal trials. That law did not help Gideon, however. He was accused of breaking state laws, so he was tried in a state court. Here is where the 14th Amendment comes in. As you remember, the 14th Amendment promises that states will not deprive people of

life, liberty, or property without due process of law. Gideon had certainly been deprived of liberty because he had been put in jail. Had this liberty been taken away without due process of law? The answer depends on the meaning of "due process of law."

HOW WAS THE CASE DECIDED?

In a unanimous opinion written by Justice Hugo Black, the Court ruled in Gideon's favor.

WHAT DID THE COURT SAY ABOUT CONSTITUTIONAL RIGHTS?

Two different views of the Court explain why the 14th Amendment requires the appointment of lawyers for people too poor to hire lawyers themselves. One is the **incorporation view**. Justices who take this view think that the purpose of the due process clause is to take the first eight amendments in the Bill of Rights, which previously applied only to the federal government, and apply them to the states. In other words, the first eight amendments in the Bill of Rights would be incorporated into state court procedures. The second is the **fundamental liberties view**. Justices who take this view believe that "due process of law" means "whatever is necessary for justice." They think that what is necessary for justice may not include every promise in the first eight amendments. But they also believe that what is necessary for justice may include promises that go beyond anything in the first eight amendments. In *Gideon v. Wainwright* the justices came to the same conclusion about what should be done even though they held different views about the 14th Amendment.

Justice Black, who wrote the Court's opinion in *Gideon*, believed in the incorporation view. However, because he was writing for all nine justices, he had to take their opinions into account. Not all of them accepted the incorporation view. Thus, the opinion was a compromise. It included only general statements that would be acceptable to justices holding either view. The opinion said that the Sixth Amendment's promise of the "assistance of counsel" is necessary for a fair trial in any court. It did not say, however, that every other promise in the first eight amendments is also covered by the due process clause.

WHAT IMPLICATIONS DOES THIS CASE HAVE FOR THE FUTURE?

The first attempt to give free legal help to the poor was in 1876, when a group of German Americans formed a committee to give legal assistance to poor people. Such legal aid societies were quite successful. At first, they usually had too little money and too few volunteers to handle many criminal cases. *Gideon v. Wainwright* was one of several key Supreme Court cases guaranteeing that the government would pay lawyers to help poor people accused of crimes. A landmark law that provided such funding was the Criminal Justice Act of 1964, signed into law the year after the *Gideon* decision. Today, a few states have public defender programs with lawyers who receive a state salary to assist poor defendants. However, this is expensive. In most states lawyers for the poor are appointed by judges and paid by the state on a case-by-case basis. As you can see, *Gideon* is part of a long development in the assistance of poor people who are accused of crimes. This development is still going on.

BRAIN TEASERS

1. Carefully read all of the promises made in the first eight amendments to the Constitution. Make a list of the rights that are guaranteed in civil or criminal trials.
2. Now go over your list. Remember that originally, these promises only protected people from action by the federal government. Can you find any that, in your opinion, are not needed to protect people against state governments? Support your answer.
3. Does your list include everything necessary to guarantee justice in civil and criminal trials or should some promises be added? Explain your reasoning.

13. *MIRANDA V. ARIZONA* 384 U.S. 436 (1966)

WHAT WAS THIS CASE ABOUT?

The story. On March 13, 1963, an 18-year-old woman was kidnapped near Phoenix, Arizona. A few days later Ernesto Miranda was arrested for the crime and taken to the police

station. He was 23 years old, lived in poverty, and had a limited education.

At the police station the victim picked out Ernesto Miranda from a lineup. Two officers then took him to a room to question him. Although at first Miranda denied the crime, after a short time he gave a detailed oral confession. He then made a written confession, which he signed.

At Miranda's trial the two officers testified that they had warned Miranda that anything he might say could be used against him in court and that Miranda had understood. The officers also said that he had given the confessions without any threats or force. They admitted, however, that they had not told Miranda about his right to silence or legal assistance. Miranda was found guilty and sentenced to a long prison term. After his conviction was upheld by the Arizona Supreme Court, Miranda appealed to the United States Supreme Court. He said that by neglecting to inform him of his rights to silence and to a lawyer, the police had violated rights promised to him by the Fifth, Sixth, and 14th Amendments.

The question. Is it a violation of the Fifth, Sixth, or 14th Amendment to use a confession from a person who has not been informed of his or her constitutional rights to silence and legal assistance?

The issues. You have already read that the Sixth Amendment promises the assistance of a lawyer in federal courts to people accused of crimes and that the 14th Amendment applies this promise to the states. Another promise about the way trials are conducted is given in the Fifth Amendment. It says: "No person . . . shall be compelled [forced] in any criminal case to be a witness against himself. . . ." For a person to be a "witness against himself" means to give information that shows he or she is guilty. The Fifth Amendment gives a person the right to refuse to give such information—to be silent. Without such a right, innocent people could be tortured until they confessed to crimes that they did not commit.

One issue in the *Miranda* case was when a person's Fifth and Sixth Amendment rights begin. Do they begin only at the trial? Perhaps you have heard news reports about witnesses answering courtroom questions by saying, "I take my Fifth Amendment right to

remain silent." Or do these rights begin earlier, in the police station, or even at the scene of arrest?

An even deeper issue concerns the meaning of being forced to be a witness against oneself. You already know that Miranda was not tortured or threatened. But there might be other ways of forcing or compelling a person to give information. What other ways are there? Perhaps keeping a person ignorant about his or her rights should count as a kind of force. Miranda was not told that he had a right to silence or legal assistance. Perhaps he thought that he had to speak. Perhaps, thinking that he was helpless, he was afraid. Perhaps letting a frightened person think that he or she has to speak is just like forcing him or her to speak. If so, then it violates the Fifth Amendment. Does this line of reasoning make sense? That question was the second issue the Court had to solve.

HOW WAS THE CASE DECIDED?

By only a five to four majority, the Supreme Court ruled that taking Miranda's confession without informing him of his rights to silence and legal assistance had deprived him of these rights.

WHAT DID THE COURT SAY ABOUT CONSTITUTIONAL RIGHTS?

The first issue facing the Court was when an accused person's Fifth and Sixth Amendment rights begin. The Court's view was that they begin as soon as the person is arrested. The second issue was whether or not failing to inform the accused person of his or her rights counts as a violation of these rights. The Court said that it does.

Today, in the very next breath after saying, "You are under arrest," a police officer reads a prisoner the *Miranda* warning. The word *read* is used because in many police departments police officers are given cards with prisoners' constitutional rights written on them. Officers read the rights so that they cannot later be faulted for misstating any of the rights. In many places the accused must sign the card, showing he or she is aware of and understands his or her rights. For people who don't speak or understand English, the whole process is done in their native language. The word *warning* is used because

prisoners are warned that anything they say may be used against them.

The Miranda Warnings

1. You have the right to have a lawyer present to advise you prior to and during any questioning; and
2. If you are unable to employ a lawyer, you have the right to have a lawyer appointed to advise you prior to and during any questioning; and
3. You have the right to remain silent and not make any statement at all and any statement you make may be used against you at your trial; and
4. Any statement you make may be used as evidence against you in court; and
5. You have the right to terminate the interview at any time.

Source: Austin, Texas, Police Department

If prisoners are not informed of their rights, then judges will rule that what they tell the police may not be used as evidence against them in court, nor can any evidence police find that was based on what the prisoner said. The arrest may still be valid, however. It is only the accused person's statements that cannot be used as evidence if the *Miranda* warning has not been read. Other evidence may be used in court, and in fact, at his second trial, *Miranda* was convicted on other evidence.

According to the Supreme Court, people can give up the rights to silence and legal assistance, but only if they do so voluntarily, knowingly, and intelligently. The Court also declared that people do not give up their right to silence simply by starting to answer questions. They may begin to answer questions but then change their minds and refuse to say anything more until a lawyer arrives.

WHAT IMPLICATIONS DOES THIS CASE HAVE FOR THE FUTURE?

Miranda v. Arizona has been one of the most controversial cases in the history of the Supreme Court. Even the members of the Court split five to four. Indeed, just as some members of the Court thought the Court had gone too far, other members thought it had not gone far enough.

Among the general public the most hotly debated aspect of the Court's decision has

been the rule that confessions given by prisoners who have not been informed of their rights may not be used as evidence in trials. The Court made this rule to prevent innocent people from being found guilty. Some people accept this reasoning. Others think that the rule prevents guilty people from being found guilty. They think it makes a police officer's job more difficult. *Miranda* demonstrates the delicate balance between protecting the accused and protecting society.

BRAIN TEASERS

1. Write two paragraphs. In the first paragraph defend the view that "The *Miranda* rule prevents innocent people from being found guilty." In the second paragraph defend the view that "The *Miranda* rule prevents guilty people from being found guilty." Try to anticipate what you think the opposing arguments would be and respond to those arguments.
2. Some people say that both statements are true—that the *Miranda* rule prevents innocent people from being found guilty and that it prevents guilty people from being found guilty. How much weight do you think should each goal be given—the goal of freeing innocent people and the goal of convicting guilty ones? Explain your reasoning.

14. TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT 393 U.S. 503 (1969)

WHAT WAS THIS CASE ABOUT?

The story. During the Vietnam War a group of adults and students in Des Moines, Iowa, planned a protest to the war. They decided to wear black armbands to show that they were against the war. When members of the Des Moines school board heard of the plan, most of them were deeply concerned. They held a meeting and decided to adopt a policy stating that any student who wore an armband to

are enough like pure speech to deserve complete freedom.

- Moreover, it said nothing at all about whether the constitutional rights of teenage citizens are as full as those of adults.

Finally, we can glimpse the future by considering the opinions of the justices who wrote separate opinions. Even though the Court tries to use the same principles over and over, sometimes its members change their minds about controversial issues. An opinion expressed by only one justice today might become the opinion of the majority 10 years later.

Justice Potter Stewart, for instance, agreed with much of what was said by the majority. He also accepted their view that the Des Moines school authorities had acted unconstitutionally. However, he said, "I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are coextensive with [extend as far as] adults." How far do the rights of teenagers extend? Justice Stewart thought that the Court should have faced this question instead of dodging it.

Justice Hugo Black did not accept the decision of the Court at all. He thought that the majority was wrong to rule that the Des Moines school officials had acted unconstitutionally. Justice Black and the majority agreed that disruption of the educational process would be a good reason to limit rights to speech in schools. But while the majority of justices did not think that the armband protest disrupted education, Justice Black said, "I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw it would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam War." The question of what is really disruptive and what is not will probably continue to divide the Court.

BRAIN TEASERS

1. What did you think about the Des Moines school board's action when you read *What Was This Case About?* Did you change your mind as you read the rest of the lesson? Why or why not?

2. The majority of the Court took it for granted that controversy alone does not count as a disruption of the educational process. Why not? Justice Black disagreed. Why?
3. The students in this case wore armbands to symbolize protest. Use your imagination to make a list of other acts that express opinions without the use of words. Which ones should be given the same freedom as pure speech? Which ones should not? Explain your reasoning.
4. Should teenagers have as much freedom of speech as adults? If you think so, explain why. If you don't think so, give examples of speech that should be permitted to adults but not to teenagers and explain your reasoning.

15. *ROE V. WADE*

410 U.S. 113 (1973)

WHAT WAS THIS CASE ABOUT?

The story. In 1970, Norma McCorvey, an unmarried pregnant woman living in Texas, sought to obtain a legal abortion in a medical facility. At that time, most states had very restrictive laws concerning the availability of abortions. Because of Texas antiabortion statutes, no licensed physician would agree to perform the abortion for Roe. Because she was financially unable to travel to another state with less-restrictive laws regulating abortions, Roe faced either continuing an unwanted pregnancy or having the procedure performed in a nonmedical facility, which, she believed, would endanger her life.

Roe claimed that the Texas antiabortion laws were unconstitutional in that they interfered with her right of personal privacy that is protected by the Ninth and 14th Amendments. She decided to take legal action, naming in her lawsuit Henry Wade, then the district attorney of Dallas County, Texas. Throughout the case, Norma McCorvey used the pseudonym of Jane Roe. The case was presented to the Supreme Court in December 1971. It was reargued in October 1972 and decided on January 22, 1973.

The question. Is it a violation of a person's right to privacy for a state to prevent a woman

from terminating a pregnancy through an abortion?

The issues. The 14th Amendment says that "No state shall make or enforce any law which shall abridge the privileges . . . of citizens of the United States . . . nor deny to any person . . . the equal protection of the laws." The Ninth Amendment states that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Do these amendments encompass and protect a woman's right to a legal abortion?

HOW WAS THE CASE DECIDED?

In an opinion written by Justice Harry Blackmun, the Court ruled that the 14th Amendment's due process guarantee of personal liberty guarantees the right to personal privacy. This guarantee protects a woman's decision whether or not to continue a pregnancy and assures that a state's laws do not abridge, or diminish, this right. The vote was seven to two, with Chief Justice William Rehnquist and Justice Byron White dissenting.

WHAT DID THE COURT SAY ABOUT CONSTITUTIONAL RIGHTS?

In ruling that a state cannot prevent a woman from terminating a pregnancy during the first three months, the Court relied on citizens' right of privacy. Justice Blackmun stated in his opinion that "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." In its ruling, however, the Court recognized the right of a state to regulate abortions as a pregnancy progressed. Justice Blackmun divided pregnancy into three trimesters:

- During the first trimester, or first three months, of a pregnancy, a woman has an unrestricted right to an abortion, although a state can prevent abortions performed by nonphysicians.
- During the second trimester, a state can regulate abortions to protect a woman's health.

- Only in the third trimester, or final three months, of a pregnancy can a state forbid an abortion, unless it is necessary to protect a woman's health.

The ruling also said that a state cannot, on its own, adopt a theory of when life begins. This prevents a state from giving a fetus the same rights as a newborn child.

In 1965, the Court had considered the constitutional right to privacy in *Griswold v. Connecticut*, in which it ruled that restrictions on the availability of contraceptives violated this right. The right to privacy—the basis for the Court's ruling in *Roe v. Wade*—thus became a pivotal issue in cases that challenged abortion laws.

WHAT IMPLICATIONS DOES THIS CASE HAVE FOR THE FUTURE?

In his dissent, Chief Justice Rehnquist wrote, "The Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it." Today, *Roe v. Wade* is well known as the case that legalized abortion in the United States.

In the decades following the ruling, related cases have been decided that some people claim weaken the legislative impact of *Roe v. Wade*. In *Harris v. McRae* (1980), the Court ruled that the federal and local governments did not have to pay for abortions for women on welfare, even if the abortions were necessary for medical reasons. Critics of this ruling claimed that women who could not afford the procedure would, like Jane Roe, be faced with either continuing an unwanted pregnancy or resorting to dangerous measures to terminate it. Thus far, efforts to overturn *Roe v. Wade* have been unsuccessful. The strongest threat to the ruling has been *Webster v. Reproductive Health Services* (1989), which added more restrictions on the availability of abortions.

BRAIN TEASERS

1. Some legal experts contend that gender discrimination, rather than right to privacy, should have been the grounds of the Supreme Court's opinion in *Roe v. Wade*. For example, many abortion supporters argue that a woman has a constitutional right to make decisions regarding her own

- body. In a paragraph, explain whether you agree or disagree with this argument.
2. Explain the importance of the Ninth and 14th Amendments to the Supreme Court's ruling in *Roe v. Wade*.

16. UNITED STATES V. NIXON 418 U.S. 683 (1974)

WHAT WAS THIS CASE ABOUT?

The story. It was late at night on June 17, 1972. In most of the nation's capital people were sleeping. In the Watergate Hotel five burglars were breaking into the headquarters of the Democratic National Committee. Their criminal mission was to photograph the Democratic party's plans for the upcoming presidential campaign and to install "bugs" for listening in on the Democratic party's telephone conversations. The burglars were caught in the act. One of them turned out to be an employee of President Richard Nixon's campaign organization, called the Committee to Re-elect the President. Investigation showed that two other Republican campaign officials were also involved.

When the president denied that anyone at the White House had known about the burglary, most people believed him. After his re-election, however, investigators uncovered additional information. Important members of the Nixon administration *had* known about the burglary after all. In a massive cover-up, they had even destroyed evidence! Most shocking of all, the president's lawyer, John Dean, testified before the Senate that the president had helped plan the cover-up from the beginning.

Could this be true? When Nixon denied it, investigators were stumped. But then another witness revealed that Nixon had secretly tape-recorded every conversation that had ever taken place in his office. The tapes would show whether or not Nixon was telling the truth.

By April 1974 criminal charges had been filed against seven members of the Nixon administration. Though Nixon was not charged, he was listed in the case as one of the people involved in the conspiracy. The special prosecutor in charge of the case at the time, Leon

Jaworski, asked Nixon to let him hear the tapes. Nixon had already ordered a previous special prosecutor fired for asking the same thing, and to no one's surprise, Nixon refused again. However, Jaworski persisted. He asked the federal district court for help. When the judge ordered Nixon to release the tapes to the court for secret examination, Nixon disobeyed.

Refusing the special prosecutor's request caused a scandal, but disobeying the judge's order caused much more than a scandal. It caused a constitutional crisis—a tug of war between two branches of government. Could a president defy a federal judge?

Nixon claimed that he could. As president, he said, he had an **executive privilege** of keeping presidential communications confidential. He also said that the privilege was absolute, which meant that nobody could override it for any reason. Because of the urgency of the case, the United States Supreme Court agreed to skip over the Court of Appeals in order to settle the case right away.

The question. Does the Constitution give the president an absolute executive privilege?

The issues. President Nixon gave two arguments for his position. His first argument was that the principle of separation of powers requires that the executive and judicial branches be totally independent of each other. If presidents had to obey judges who ordered them to release evidence, this independence would be destroyed.

His second argument was that the secrecy of communications between a president and his advisers is necessary for the president to be able to look after the public good. Nixon said that if a president's advisers know that anything they said could be repeated to the public, they might worry too much about what people would think, and they would not give him good advice. Nixon said that if a president didn't receive good advice, it would be harder for him or her to carry out the presidency as spelled out in the Constitution.

HOW WAS THE CASE DECIDED?

In a decision written by Chief Justice Warren Burger, the Court ruled that the president's executive privilege is not absolute and that

Nixon had to turn over the recorded tapes as he had been ordered.

WHAT DID THE COURT SAY ABOUT GOVERNMENTAL POWERS?

The Court examined each of the president's two arguments in turn. One, you remember, was that preservation of the separation of powers requires the executive and judicial branches to be totally independent. Total independence means that the president does not have to obey court orders to release evidence. The chief justice rejected this claim. The Constitution is based on separation of powers, but under this separation it gives each power or branch a job of its own to do. If the president could withhold evidence from the courts, the courts could not do the job the Constitution gave them. "The powers," concluded the chief justice, "were not intended to operate with absolute independence."

Nixon's second argument was that communications between the president and his advisers need to be confidential for the sake of the public good. Chief Justice Burger admitted that sometimes confidentiality, or secretiveness, is important. But it only applies in specific instance. When communications are about diplomatic or military secrets, confidentiality is of the utmost importance. On the other hand, when communications concern other subjects, confidentiality might not be important at all. The chief justice concluded that in presidential claims of executive privilege, the need for confidentiality must be balanced against competing needs on a case-by-case basis.

Now, how does this idea help settle the case at hand? With what other need or needs did confidentiality compete in *United States v. Nixon*? It competed with the need to find out the truth in a criminal trial. The purpose of criminal justice, said Chief Justice Burger, "is that guilt not escape or innocence suffer." But finding out the truth in a criminal trial requires that courts have all the evidence they need, even if it includes presidential communications. In this case the courts needed the information on the tapes to carry out their duty. When the need to find out the truth in the Watergate trial was weighed against President Nixon's need for confidentiality, confidentiality lost. Confidentiality might have won had the tapes been about

diplomatic or military secrets or had they not contained crucial evidence. Moreover, the district court had not even planned to make the complete tapes public. It had planned to examine them in secret first. Only the parts that were necessary for the trial would be used in open court.

WHAT IMPLICATIONS DOES THIS CASE HAVE FOR THE FUTURE?

If the president had defied the Supreme Court as he had defied the district court, it would have been an important sign for the future. One reason is that the courts have no enforcement powers of their own. They depend on the executive branch to enforce their orders. If the executive branch defies a court order, the courts have no recourse. Another reason is that successful defiance of the Supreme Court would call the entire idea of judicial review into question. The judicial branch is the final judge of the meaning of the Constitution. Defiance by the president would be like saying that the executive branch is its own final judge.

Nixon did not defy the Supreme Court. He obeyed, not out of respect for judicial review, but out of self-interest. He feared that unless he gave in, the Senate would remove him from office. Even so, the evidence of the tapes turned out to be so damaging that Nixon felt he had to resign or the House would start impeachment proceedings. The tapes showed that he had been part of the cover-up.

What principles emerge from this case? The Court did not say whether or not such a thing as executive privilege exists. However, it clearly stated that there is no such thing as an absolute executive privilege. The Court put forth the following principles:

- The president's need for confidentiality must be weighed against competing needs, such as the needs of the criminal justice system.
- In disputed cases this weighing may be done by the federal courts.

Conflicts over executive privilege will probably continue to arise. Presidents have claimed executive privilege over 50 times just since 1952. In most of these cases they claimed the privilege in order to avoid giving Congress information that it had requested. So long as the two main principles listed above are accepted by all parties, these

conflicts have much less chance of hurting the nation. The final decision is made by the judicial branch.

BRAIN TEASERS

The Constitution gives both the president and Congress important responsibilities for foreign policy. In Congress most of the weightiest responsibilities are given to the Senate. Use your imagination to make up a story about a conflict in which the Senate requests key foreign-policy documents, but the president claims executive privilege.

In your story:

- a. Explain exactly what documents the Senate wants and why it wants them.
- b. Explain why the president wants to keep the documents confidential.
- c. Have the conflict settled by the Supreme Court. Tell what decision the court hands down and explain the basis of its reasoning.
- d. Is the Court's decision unanimous? If any justices dissent, explain their reasoning.

17. GREGG V. GEORGIA 428 U.S. 153 (1976)

WHAT WAS THIS CASE ABOUT?

The story. Troy Leon Gregg was convicted in Georgia of two counts of armed robbery and two counts of murder. Evidence in Gregg's trial showed that on November 21, 1973, Gregg and a companion were hitchhiking north in Florida and were given a ride by two men. The bodies of the two men who offered the ride were found on November 22. Gregg admitted shooting and robbing the victims, although at first he claimed self-defense. Gregg was sentenced to death. Georgia's death penalty law provided for mandatory review by the Georgia Supreme Court, whose job it was to consider whether the death sentence imposed was influenced by "passion, prejudice, or any other arbitrary factor," whether the evidence supported the findings of one of ten "aggravated circumstances," and whether the penalty was "excessive or disproportionate" in relation to similar cases.

The Georgia Supreme Court reversed the sentencing for the robbery charge, holding that the death penalty was rarely imposed for armed robbery in Georgia. It upheld the sentence for the murders, however, holding that the sentencing did not result from any arbitrary factor and was not excessive or disproportionate to the penalty in similar cases. Gregg maintained that the death sentence he was given was "cruel and unusual punishment" and unconstitutional under the Eighth and 14th Amendments. The U.S. Supreme Court heard the case on March 31, 1976, and announced its decision regarding the case on July 2, 1976.

The question. Does the imposition of the death penalty for the crime of murder under Georgia law violate the Eighth and 14th Amendments?

The issues. At the heart of *Gregg v. Georgia* was the issue of whether the death penalty inflicts "cruel and unusual punishment" in violation of the Eighth Amendment and whether Gregg's civil rights as outlined in the 14th Amendment were being violated. Four years earlier, in *Furman v. Georgia*, the Supreme Court had nullified, or struck down, all death penalty statutes as they were then being applied in the United States. The issue in *Furman*, however, was that these state laws gave too much discretion to judges and juries in deciding whether to impose the death penalty.

In the wake of *Furman*, 35 states passed new laws. Some laws now made the death penalty a mandatory sentence for crimes such as killing a police officer. Other state laws adopted a bifurcated, or two-part, procedure in which the issue of guilt or innocence would be determined first, with a second hearing determining the penalty and whether the circumstances surrounding the crime justify the death sentence. On the same day that the Supreme Court decided *Gregg v. Georgia*, it ruled in *Woodson v. North Carolina* that mandatory death sentences were in violation of the Eighth Amendment. Gregg's fate, however, still revolved around the issue of whether the death penalty was cruel and unusual punishment. The Court focused on the two-stage approach to the death penalty and whether the state of Georgia had fairly applied this approach to Gregg and whether the Georgia

statute prevents "arbitrary and disproportionate" death sentences. The Court also considered what constitutes "cruel and unusual punishment."

HOW WAS THE CASE DECIDED?

In an opinion written by Justice Potter Stewart, the Court ruled that the punishment of death for the crime of murder did not, invariably, violate the Eighth and 14th Amendments of the Constitution. In other words, when applied fairly, the death penalty is not unconstitutional.

WHAT DID THE COURT SAY ABOUT CONSTITUTIONAL RIGHTS?

According to the opinion delivered by Justice Stewart, the death penalty for persons convicted of first-degree murder is constitutional when it is proportionate to the severity of the crime. Georgia's law, the Court found, prevents arbitrary and disproportionate death sentences because of the following:

- The state's two-step procedure allows full consideration of the evidence. (First, guilt or innocence is determined and, in a second step, the sentence is determined.)
- The sentencing body must make specific factual findings to support the sentence.
- The mandatory review by the state Supreme Court ensures that the punishment is not disproportionate to the crime.

In reference to the phrase "cruel and unusual punishment," the Court noted that when the phrase was first written it referred to "barbarous" methods of punishment. In interpreting the Eighth Amendment today, "evolving standards of decency" must be acknowledged and the "punishment must not be excessive" or "inhumane" relative to these standards. According to Justice Stewart, "When a life has been taken deliberately . . . punishment by death is not . . . disproportionate to the crime." In the Court's opinion, an "extreme" crime is proportionate to an extreme penalty. In short, the Court's interpretation of the Constitution is that capital punishment is legal.

WHAT IMPLICATIONS DOES THIS CASE HAVE FOR THE FUTURE?

Since deciding *Gregg v. Georgia*, the Supreme Court has reviewed other cases that have

given it the opportunity to reiterate its position that the death penalty itself is not unconstitutional but that it must be applied fairly. Of course, what is "fair," particularly to a person facing a death sentence, remains a source of controversy and debate. In *Thompson v. Oklahoma* (1988), the Court again considered the Eighth and 14th Amendments in deciding the issue. In *Thompson*, however, the Court decided that the death penalty was not justified—not because the death penalty itself is unconstitutional but because the sentence was not being applied fairly.

Today, the death penalty is illegal in some states but legal in many others. Hundreds of convicted felons await their execution on "death row." Assuredly, the Court will continue to decide cases that question the legality of capital punishment. Current arguments surrounding the death penalty include:

- Is it right for anyone to take the life of another, whether in an act of violence or as a punishment?
- Is the death penalty a deterrent to crime?
- What if it is found that the person put to death is innocent?

BRAIN TEASERS

1. Divide a sheet of paper into two columns labeled "For" and "Against." Under the appropriate heading, list arguments used for and against the death penalty.
2. Imagine that you are a Supreme Court justice hearing the case of *Gregg v. Georgia*. Write a paragraph either supporting or opposing the Court's ruling.
3. Do you think the death penalty is "cruel and unusual punishment"? Why or why not?

18. REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE 438 U.S. 265 (1978)

WHAT WAS THIS CASE ABOUT?

The story. Allan Bakke wanted to become a doctor. Twice—in 1973 and again in 1974—he applied for admission to the medical school at the University of California at Davis. During these years the medical school

operated two different admissions programs. Since the Civil Rights Act of 1964, there had been a lot of pressure from legislative and special interest groups for schools and other institutions to provide special admissions programs for minority students. There were, however, no specific guidelines on how this was to be accomplished.

In the medical school at the University of California at Davis, 84 of the 100 places in the incoming class were filled from the regular program, while 16 were set aside to be filled from the special program, which used a **quota system**. A quota is a share, or number, assigned for a particular purpose. The regular program was for students of all races, so long as they met admission requirements. One of these was a minimum grade point average. Only members of racial minorities could apply through the special program, however, and their college grade averages did not have to meet the minimum.

Bakke, a white male, applied through the regular program. His grades and test scores were good, and both years he got to the final stage of the admissions process. However, both years he was turned down. He thought he had been treated unfairly because in both years, students had been admitted through the special program whose grades and test scores were much lower than his own. He decided to sue the state university system, of which the University of California at Davis was a part. Bakke said the special program, established to fulfill the racial quota, had kept him from being admitted to medical school. He argued that the Davis admissions system violated his 14th Amendment right to equal protection of the law, and he asked the courts to order the medical school to admit him.

The California Supreme Court made two rulings. One said that the Davis admissions system was illegal and ordered that Bakke should be admitted to the medical school. The other ordered that in the future, race should not be given any consideration at all in admissions. Representatives of the California university system appealed both of these rulings to the United States Supreme Court.

The questions. First, does the use of a racial quota in admissions violate the equal protection clause of the 14th Amendment? Second, does the equal protection clause require that

race be ignored completely? The United States Supreme Court had to consider these questions separately, because there might be ways of taking race into account that do not involve quotas.

The issues. Historically, most racial discrimination in our country has hurt members of racial minorities. Bakke complained about a different kind of discrimination. Sometimes called reverse discrimination, it hurt members of the racial majority, like Bakke, in order to help members of racial minorities. Since 1952 the Supreme Court had often spoken out against racial discrimination. Sometimes the famous words that Justice Harlan included in his dissent to *Plessy v. Ferguson* were quoted—that the Constitution is “color-blind.” If the Constitution is “color-blind,” then both forms of racial discrimination are unconstitutional—the traditional kind and the reverse kind. Before the *Bakke* case the Court had never had to consider reverse discrimination. Would it rule that both kinds of racial discrimination were unconstitutional?

Consider these facts as you think about the question. The main reason that the 14th Amendment was written was that African Americans who had recently been freed from slavery needed protection against discrimination by the white majority. This fact might lead you to think that the equal protection clause protects racial minorities more than the racial majority. On the other hand, what the amendment actually says is that no state may deny to *any* person the equal protection of the laws. This fact might lead you to think that the equal protection clause gives the same protection to people of all races. So the intent seems to have been to protect minorities while the wording does not specify this intent. As you can see, the Supreme Court was faced with a very difficult problem.

You may wonder what the 14th Amendment has to do with this case at all, because it speaks of what a state may do. Bakke's complaint was about a school. The reason that Bakke could use the 14th Amendment was that the school was part of a state-run university system.

HOW WAS THE CASE DECIDED?

The Court made a two-part ruling. One part agreed that the use of a racial quota in admissions to the medical school at the University

of California at Davis was unconstitutional and ordered that Bakke should be admitted. The other part rejected the idea that an admissions system may never pay any attention to race at all.

WHAT DID THE COURT SAY ABOUT CONSTITUTIONAL RIGHTS?

Justice Lewis Powell wrote the Court's opinion. He said that the equal protection clause does not completely prohibit states from taking race into account when they are making laws and official policies but that it does make the consideration of race "suspect," or suspicious. When such a law or policy is challenged in court, judges must study it especially closely. The judges must apply a two-part test. First, are the purposes of the law or policy legitimate? Second, is the consideration given to race necessary to achieve these purposes? The law or policy is upheld only if the answer to both questions is yes.

California told the Court that its racial quota had four purposes. Let's see what Justice Powell said about each one.

Purpose 1. To correct the shortage of racial minorities in medical schools and among doctors.

Justice Powell said that this purpose was not acceptable. "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."

Purpose 2. To counteract the effects of racial discrimination in society.

Justice Powell said that this was an acceptable purpose. He approved of helping people who belong to groups that have been hurt by past racial discrimination. However, he said that helping them by hurting others is right only when it makes up for hurts that those specific others have done to them. There was no evidence that Allan Bakke or any other whites kept out of medical school by the quota had ever discriminated against people of racial minorities.

Purpose 3: To increase the number of doctors who will be willing to practice medicine in communities where there are not enough doctors now.

This purpose was also acceptable. But in order to bring more doctors to communities that needed them, was it necessary to have a

racial quota in admissions to medical school? Justice Powell said that California had not shown this argument to be true.

Purpose 4: To improve education by making the student body more diverse.

This purpose, too, was acceptable. But Justice Powell made two points. First, racial diversity is only one aspect of overall diversity. Second, Justice Powell said that racial quotas are not needed to increase racial diversity. To prove this he discussed the experience of Harvard College. Harvard considers it a plus if an applicant belongs to a racial minority, but the college does not "insulate the individual from comparison with all other" applicants the way that a racial quota system would. In other words, the college compares all applicants equally. Yet the Harvard admissions system has been successful in increasing racial diversity in the Harvard student body.

WHAT IMPLICATIONS DOES THIS CASE HAVE FOR THE FUTURE?

You remember that one part of the Court's judgment agreed that the use of a racial quota in admissions to Davis Medical School was unconstitutional, while the other part rejected the idea that an admissions system may never pay any attention to race at all. What made this judgment unusual was that although a majority of five to four agreed with each part, Justice Powell was the only member of the Court to support both parts. The four who joined him in supporting the first part did not support the second part, and the four who did not agree with the first part joined him in supporting the second part. This situation shows how sharply the members of the Court disagree about reverse discrimination. Probably a majority will continue to hold that racial quotas and other forms of special treatment are unconstitutional. In a 1986 case called *Wygant v. Jackson Board of Education*, for instance, the Court said that members of racial minorities may not be given special treatment when a school board has to lay off some employees. However, disagreement about other ways in which government may take race into consideration in order to help members of racial minorities is likely to continue.

Justice Powell also stressed that the Court's decision in *Bakke* concerned only reverse racial discrimination. He warned that reverse sexual discrimination may or may not have to

be treated the same way. So far, however, the Court has treated reverse discrimination pretty much the same whether it concerns race or sex. In a 1982 case called *Mississippi University for Women v. Hogan*, for example, the Court ruled that it was unconstitutional for a state-run school of nursing to refuse admission to men.

BRAIN TEASERS

1. Why did Allan Bakke sue the state university system of California? Why did he use the 14th Amendment in his argument to the courts?
2. Any policy that aims to give special help to members of groups that have been unfairly hurt by past discrimination is called an **affirmative action policy**. How would you set up affirmative action programs that do not involve quotas?

19. *PLYLER V. DOE* 457 U.S. 202 (1982)

WHAT WAS THIS CASE ABOUT?

The story. For a little more than 100 years the United States has had laws that limit immigration. Many of the people from other countries who apply to immigrate are accepted, but many others are not. Some people want to live here so much that they enter the country illegally. These people are officially called **undocumented aliens**, which means they are foreigners who do not have papers showing that they have permission to be in the country. Millions of undocumented aliens "now live in various states. Many work, pay taxes, and send their children to school, but they live in fear that they will be found out and sent back out of the country against their wills."

Texas is one of the states with an especially large number of undocumented aliens. In 1975 the Texas legislature passed a new education law. This law told local school districts that they would no longer receive any state money to educate the children of undocumented aliens. It also told the school districts that they could refuse to let the children of undocumented aliens enroll in public schools.

The Constitution promises due process of law not just to all citizens but to all people. Aliens can use our courts, even if they are here illegally. A lawsuit was started in Texas on behalf of several children of undocumented aliens. To conceal their identities, the true names of the children were not used, which is why the name Doe is used in the title of the case. Spokespeople for these children said that the new Texas law violated the 14th Amendment. They argued that when the Texas legislature ruled that the children could not receive the same education that other children received, it deprived them of equal protection of the laws. After winding through the lower courts, the case was decided by the United States Supreme Court in 1982.

The question. Does it violate the equal protection clause of the 14th Amendment for a state to deny public school enrollment to the children of undocumented aliens?

The issues. At first it may seem that the promise of "equal protection of the laws" means "every group of people must be treated exactly the same as every other." A moment's thought, however, will show you that the writers of the 14th Amendment could not have meant that. For example, people of different ages are not treated the same—only people eighteen years of age or older are allowed to vote. In fact, almost every law classifies people into groups that are treated differently. If there were something wrong with this, it is hard to see how there could be a system of laws at all. But classifications are more likely to be unfair than others. As you remember from *Regents of the University of California v. Bakke*, such classifications are called "suspect." Who decides which classifications are suspect and which are not? After careful study of the Constitution, it is the responsibility of the courts to decide the issue. The Texas law that was protested in *Plyler v. Doe* classified schoolchildren into two groups: (1) children of undocumented aliens and (2) all others. What the Supreme Court had to decide was whether this classification should be considered as suspect.

HOW WAS THE CASE DECIDED?

In an opinion written by Justice William Brennan, the Court ruled that the 14th

Amendment prohibits states from denying public school enrollment to the children of undocumented aliens. The vote was five to four.

WHAT DID THE COURT SAY ABOUT CONSTITUTIONAL RIGHTS?

Justice Brennan said in the ruling that education is not a constitutional right. He also said that grouping people into those who are in the country legally and those who are in the country illegally is not a suspect classification. These two statements may surprise you because they seem to lead to a different conclusion than the one Justice Brennan reached. What led him to his conclusion was what he said after making the two statements. Let's look at what he said after each one.

Although Justice Brennan said that education is not a constitutional right, he said that it is special in another way. Lack of education is an obstacle to achieving things by one's own merit. Justice Brennan thought that one of the purposes of the equal protection clause was to remove such obstacles.

Although Justice Brennan said that grouping people into those who are in the country legally and those who are in the country illegally was not a suspect classification, he said that applying the classification to children was hard to justify. Children cannot help it if they are in the country illegally; the parents brought the children into the country. Yet by keeping these children out of public school, Texas was punishing the children, not the parents.

Justice Brennan's conclusions was that the Texas law could be justified only if it was the only way to achieve some extremely important government goal. He could not think of any extremely important government goal for which the law was necessary, so he ruled against it.

WHAT IMPLICATIONS DOES THIS CASE HAVE FOR THE FUTURE?

The most obvious change resulting from the Court's decision is that children of undocumented aliens must be allowed to enroll in public schools. The way in which Justice Brennan reached this conclusion has implications for the future, too. This case was the first one in which the Court ever said that a government benefit that is not a constitutional

right can sometimes have constitutional protection anyway. Of course, the only government benefit the Court made this ruling about was education. It might, however, make this ruling about other government benefits that are special in the same way that education is. Remember that in Justice Brennan's view, what makes education special is that it removes obstacles to achieving things by one's own merit. There might be other government benefits that remove such obstacles, too.

Another possibility is that the Court will go in the other direction—not extending *Plyler v. Doe*, but reversing it. The vote in the case was very close—five to four. Since the case was decided there have been changes in the membership of the Court. These changes make it quite possible that the dissenter's views will become majority views on a similar case in the future.

What did the dissenting justices say? They firmly agreed that the Texas law was senseless. They said that it might bring about a society largely made up of illiterate people. They also admitted that Congress had failed to exercise leadership in solving United States immigration problems. These dissenters said that if it were up to them to make social policy, they would certainly make it differently. But then they stressed that it was not up to them to make social policy. Courts are not legislatures. The dissenters believed that for judges to say that something is unconstitutional when it is really only foolish is a violation of the separation of powers.

BRAIN TEASERS

1. Justice Brennan thought that one of the purposes of the equal protection clause was to remove obstacles to achieving things by one's own merit. Make a list of some other government benefits that remove such obstacles and explain your reasoning.
2. The Texas law classified schoolchildren into two groups: (1) children of undocumented aliens and (2) all others. In court Texas said that treating these two groups differently was necessary to achieve certain important government purposes. What important government purposes do you think Texas was trying to achieve?

3. The dissenting justices said that even though the Texas law was senseless, nothing in the Constitution could justify overruling it. Do you agree? Why or why not? Before you answer, examine the wording of the Constitution itself.

20. *ROBERTS V. UNITED STATES JAYCEES* 468 U.S. 69 (1984)

WHAT WAS THIS CASE ABOUT?

The story. The United States Jaycees (Junior Chamber of Commerce), founded as a young men's club in 1920, is a national organization with local chapters. Most members are business people. The local chapters help the members develop their management skills and other personal abilities. They also operate community charities and health programs and put on sporting events. Traditionally, the Jaycees limited regular membership to young men between the ages of 18 and 35. Women and older men could join, but only as associate members. Associate members paid lower dues than regular members, but they could not vote, hold office, or take part in some of the leadership training programs.

During the 1970s the Minneapolis and St. Paul chapters of the Jaycees began to allow women to become regular members. In 1978 the national organization tried to make them stop. It warned the chapters that they would lose their right to call themselves part of the Jaycees. After this warning the two chapters complained to the Minnesota Department of Human Rights. They said that the national Jaycees' rule against letting women be regular members violated a Minnesota human rights law. According to this law, businesses offering goods and services to the public may not discriminate on the basis of sex.

The national organization asked the federal courts for help. It said that by telling Jaycees who to let into their club, the state of Minnesota was violating the First Amendment. One federal court said this argument was incorrect. Then, a higher federal court said the argument was correct. In 1984 the case came to the United States Supreme Court for judgment.

The question. Is it a violation of the First Amendment for a state law to force the United States Jaycees to allow their local chapters to admit women as regular members?

The issues. The First Amendment says, "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble." Because of the 14th Amendment, this clause limits state legislatures in the same way that it limits Congress.

What exactly does it mean for the people to have a right "peaceably to assemble"? In its narrow meaning, the right protects democracy. Officials are not allowed to stop citizens from holding peaceful meetings to complain about what the government is doing. The Supreme Court, however, has said that the right has a broader meaning, too—"freedom of association."

The members of the national Jaycees organization thought that if some men and women wanted to be in a club together they should form their own club. They should not make an existing club change. To make an existing club change would interfere with its members' choices about whom to let into the club.

HOW WAS THE CASE DECIDED?

In an opinion written by Justice Brennan, the Court ruled that the Minnesota law did not violate the First Amendment promise of freedom of association. In other words, Minnesota could require the Jaycees chapters in the state to accept women as regular members instead of only as associate members.

WHAT DID THE COURT SAY ABOUT CONSTITUTIONAL RIGHTS?

Justice Brennan said that previous cases had shown that freedom of association has two different sides:

- Freedom of intimate association

The government cannot intrude on highly personal relationships.

- Freedom of expressive association

The government cannot stop people from assembling in order to exercise their other First Amendment rights, such as free speech and free exercise of religion.

To make his reasoning simpler Justice Brennan considered both sides of freedom of association in turn. First he asked whether or not the Minnesota law violated the Jaycees' freedom of intimate association. He said that it did not, because Jaycees chapters are very large and not particularly selective about who may join.

Next Justice Brennan asked if the Minnesota law violated the Jaycees' freedom of expressive association. He said that it did, because Jaycee members might have been brought together by shared opinions. Forcing them to accept new members they did not want might make it harder for them to express their opinions.

However, Justice Brennan said that violating the right to freedom of expressive association is not always wrong. A state law that violates the right is acceptable if the law meets three tests. First, the law must help achieve some important state purpose. Justice Brennan said it did—the purpose of fighting discrimination against women. Second, the purpose must not be to suppress opinions the state government does not like. Justice Brennan said that the law's purpose was not to suppress opinions. Third, the law must be the least restrictive of all possible ways to accomplish the purpose. Justice Brennan thought that it was.

After studying all three tests, Justice Brennan said that the Minnesota law did not violate the Jaycees' freedom of intimate association. It did violate the Jaycees' freedom of expressive association, but the violation was justified.

WHAT IMPLICATIONS DOES THIS CASE HAVE FOR THE FUTURE?

This case is very important for the future because it means that just calling a club "private" does not keep the government from making judgments about its membership policies. Notice, however, that the Court did not say that a private organization could not adopt a men-only policy. It only ruled on the Jaycees. The fact that Jaycee chapters are large and open to most people was very influential. If the Court were asked to rule on a private organization that was more intimate than the Jaycees, it might rule differently.

Remember, too, that only one of the Jaycees' membership policies was challenged in

this case. The rule that regular members must be men was overturned, but the rule that regular members must be between 18 and 35 years of age is still in force. We don't know how the Court might have dealt with a challenge to the age rule.

BRAIN TEASERS

Pretend that a state called New Fangle lies just between New York and New Jersey. The New Fangle state legislature passes a law against all forms of age and sex discrimination. The state's Anti-Discrimination Commission immediately files criminal charges against the following groups:

- a. a religious denomination because it accepts only men as ministers
- b. a feminist organization because it accepts only women as members
- c. a community service club because it accepts only people under 18 years of age as members
- d. a neighborhood social club because it accepts only people between the ages of 40 and 55 as members

Each group appeals to the federal courts that its First Amendment right to freedom of association has been violated. Eventually all four cases reach the United States Supreme Court. Imagine that you are a justice on the Supreme Court. Choose any two of these cases. For each one that you choose, write a Supreme Court opinion telling how the case should be settled and why. You must consider every one of the arguments you've read about in this lesson, but you are free to agree or disagree with the arguments. Make your opinion as realistic as you can.

21. *CENTRAL HUDSON GAS & ELECTRIC CORPORATION V. PUBLIC SERVICE COMMISSION* 447 U.S. 557 (1980)

WHAT WAS THIS CASE ABOUT?

The story. In the state of New York electric utility companies are regulated by the Public

Service Commission. Late in 1973 the Commission decided that there was an energy shortage. There was not enough fuel available to make all the electricity that consumers might want during the coming winter. One of the steps the Commission took to deal with this crisis was to tell electric utility companies that they were no longer allowed to make advertisements urging people to use electricity or buy electrical products. This kind of advertising is called promotional advertising because it promotes a product.

Three years later, even though there was plenty of fuel, the Commission decided to continue the promotional-advertising ban. The Commission's reasoning was that promotional advertising works against the national policy of conserving energy. Central Hudson Gas & Electric Corporation opposed this decision. It asked the courts for help, saying that the ban on promotional advertising violated the First Amendment promise of freedom of speech. In 1980 the case reached the United States Supreme Court.

The question. Does a state ban on promotional advertising by an electric utility violate the First Amendment promise of free speech? Again the case involved the 14th Amendment because it allows the First Amendment to be applied to a state.

The issues. Central Hudson Gas & Electric Corporation said that advertising should be allowed because it was commercial speech. The New York Public Service Commission disagreed. In earlier cases the Court had defined commercial speech as speech that does nothing more than propose that somebody buy something. The Court had also said that commercial speech had some constitutional protection but not as much as some other kinds of speech. This definition was rather mysterious. How much protection did commercial speech have? Did it have so much protection that promotional advertising could not be banned?

HOW WAS THE CASE DECIDED?

In an opinion written by Justice Lewis Powell, the Court ruled that the New York Public Service Commission's ban on promotional advertising for electricity violated the First Amendment.

WHAT DID THE COURT SAY ABOUT CONSTITUTIONAL RIGHTS?

The core of Justice Powell's opinion was a rule for deciding which kinds of restrictions on commercial speech are acceptable. This rule said that whenever a restriction on commercial speech is challenged in court, judges must test it in four ways:

- To what kind of commercial speech does the restriction apply? Is it the kind that the First Amendment might protect?

There is no need to go on to the other three tests unless the answer to the second part of this test is yes. An advertisement has First Amendment protection only if it is not misleading and does not invite people to do things that are against the law.

- Does the government have a "substantial interest" in restricting this kind of speech?

This test means that the government must have a fairly important purpose in mind when it draws up the restriction.

- Does the restriction "directly advance" this interest?

This test means that it is not enough for the government to *think* that the restriction helps to achieve its purpose. The restriction *must* help to achieve the purpose and the help must be direct.

- Could a less extensive restriction serve this interest just as well?

The government should not interfere with commercial speech any more than it has to. If a less extensive restriction would achieve its purpose just as well as a more extensive restriction, then the more extensive restriction should not be used.

Next, Justice Powell applied the four tests to the New York Public Service Commission's ban on promotional advertising. In this case the most important test turned out to be the last. Justice Powell agreed with Central Hudson that the Constitution gives promotional advertising for electricity and electrical products some protection. Then he agreed with the Commission that the government does have a substantial interest in energy matters. It also agreed that the ban on such advertising helped achieve a fairly important government purpose—conservation of energy. He said, however, that a partial ban could

have conserved energy just as well as a complete ban. A partial ban might even have worked better. Some ways of using electricity are more efficient than other ways, and some electrical products are more efficient than other products. Advertising that promoted these ways and these products might actually save energy rather than waste it. Because the ban was broader than it needed to be, it was unconstitutional.

WHAT IMPLICATIONS DOES THIS CASE HAVE FOR THE FUTURE?

The most important thing to come from this case is a legal test for deciding which regulations on commercial speech are constitutional and which are not. Notice, however, that the legal test is very complicated and must be applied on a case-by-case basis. Thus, the way the test is applied will still depend a great deal on the judgment of the individual justices. In general, the more a legal rule depends on the judgment of the individual justices, the less sure people are about which regulations the Court will approve and which they will disapprove. In turn, the less sure people are, the more willing they are to take a chance on challenging regulations they dislike. Thus, we can expect that there will be more commercial speech cases in the future. If there are many commercial speech cases, the justices may grow weary of them. Then the Court will probably try to come up with another legal test that is easier to apply.

BRAIN TEASERS

1. Suppose you are a member of Congress and want to pass a law limiting promotional advertising for cigarettes—perhaps a total ban, perhaps a partial ban. Certainly the tobacco companies would challenge such a law. Think carefully about all four parts of Justice Powell's test. How should you explain the law's purposes and how extensive should you make it in order to make sure that it will survive challenge in the federal court?
2. Suppose you are the president of a tobacco company. You want as few restrictions on promotional advertising for cigarettes as possible. You know about congressional efforts to limit promotional advertising for

cigarettes, and you are anxious about these efforts. Think about all four parts of Justice Powell's test. What kind of explanation of the law's purposes do you hope Congress will give, and how extensive do you hope Congress will make the law so that it will *not* survive challenge in the federal courts?

22. HAZELWOOD SCHOOL DISTRICT V. KUHLMEIER 484 U.S. 260 (1988)

WHAT WAS THIS CASE ABOUT?

The story. Hazelwood East High School is in St. Louis County, Missouri. Every three weeks the Journalism II class published a paper called *Spectrum*. The paper was distributed to more than 4,500 students, school workers, and members of the community. Because *Spectrum* was sponsored by the school, the articles that the journalism class proposed for each edition were submitted to the school administration for approval.

On May 10, 1983, the principal of the high school objected to two articles scheduled to appear in *Spectrum*'s May 13 edition. There was no time to change the articles, so the principal instructed the journalism teacher to leave the two articles out of the school newspaper. He also informed school district officials of his decision, and they agreed that he had done the right thing. One of the articles was about pregnant students at Hazelwood East. Although it did not use the students' real names, the principal feared that readers might be able to tell who the students were from the other information in the article. He was also concerned about some of the article's references to other controversial issues. He thought that the issues discussed were all right for most students to read but might be inappropriate for some of the younger students.

The other article was about how Hazelwood East students were affected by their parents' divorces. It included one student's very personal complaints about her divorced father and mother. What worried the principal was that the student was identified by name. Because of this, he thought that the student's parents should have been given a chance to

respond or to give their permission for the remarks to be published.

The journalism teacher, Howard Emerson, withheld the two articles from publication just as he had been instructed. Three students on the newspaper staff said that their First Amendment rights to freedom of speech were being violated. They sued the principal, Howard Emerson, various other officials, and the school district as a whole. After slowly working its way through the lower courts, the case was finally settled by the United States Supreme Court in 1988.

The question. Is it a violation of the First Amendment for high school authorities to exercise editorial control over the content of a school-sponsored newspaper produced in a journalism class?

The issues. You remember from *Tinker v. Des Moines Independent Community School District* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court did say in *Tinker*, however, that student action that resembles speech could be punished if it disrupted the educational process. That rule could have been applied in *Kuhlmeier*, too. The Court decided not to apply it. Why? Had the Court changed its mind?

No. The Court still agreed with what it had said in *Tinker*. But it decided that the issues in *Tinker* and in *Kuhlmeier* were different. *Tinker*, it said, was about whether or not a school could punish students for expressing their opinions. *Kuhlmeier*, by contrast, was about whether a school had to *help* students express their opinions. The Court thought that it would be a mistake to try to treat these two issues as though they were the same. But why does the issue of helping students express their opinions come up in *Kuhlmeier*? Because the students in the case wanted to express their opinions in a school-sponsored newspaper produced in their journalism class.

HOW WAS THE CASE DECIDED?

In an opinion written by Justice Byron White, the Court ruled that the First Amendment rights of the students who wrote *Spectrum* had not been violated when the school principal withheld their articles from publication.

WHAT DID THE COURTS SAY ABOUT CONSTITUTIONAL RIGHTS?

Justice White made extensive use of principles the Court had developed in cases that arose after *Tinker*. You remember that one of the issues not settled in *Tinker* was if teenagers have the same speech rights as adults. The Court had settled this issue in another case. It had announced that speech rights of teenagers "are not automatically coextensive with [do not extend as far as] the rights of adults in other settings." These rights must be "applied in light of the special characteristics of the school environment," and the school need not permit speech that clashes with its "basic educational mission." What this meant in *Kuhlmeier* was that the speech rights of the students who worked on *Spectrum* were not necessarily as far-reaching as the speech rights of adults working on a regular newspaper.

What about the idea that Hazelwood East High School should have helped the students on the *Spectrum* staff express the opinions that the cancelled articles contained? Justice White agreed that sometimes officials should actually help free speech along instead of just allowing it. But he said that this kind of help is only required in "public forums"—places such as streets and parks, which in the past "have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." So he asked, "Was *Spectrum* a public forum?" He said that two facts showed that it was not. First, working on *Spectrum* was available only to students in the journalism class. Working on the newspaper was not available to the general public or even to all students. Second, *Spectrum* was reserved for a special purpose. Its only reason for existence was to teach students journalism. What this meant for *Kuhlmeier* was that the school did not have to help the students on the *Spectrum* staff express their opinions except in ways that helped teach them journalism.

Finally, Justice White listed a number of different reasons that a school might exercise editorial control as a publisher of a school newspaper. Some of these reasons were taken from other cases and some were new. A school does not have to publish articles in any of the following cases:

- when they would “substantially interfere with its work”
- when they would “impinge upon the rights of other students”
- when they are “ungrammatical” or “poorly written”
- when they are “inadequately researched”
- when they are “biased” or “profane”
- when they are “unsuitable for immature audiences”

Justice White said that if schools could not refuse to publish articles of these kinds, they would not be able to awaken students to the values that are important to our culture, prepare students for later professional training, or help them adjust normally to their environment.

WHAT IMPLICATIONS DOES THIS CASE HAVE FOR THE FUTURE?

In order to help judges decide future cases, Justice White summed up his conclusions in a rule. We can paraphrase this rule in question-and-answer style as follows:

- Can educators, acting as editors, limit what students say in school newspapers?
Yes, but only if they can justify the limitations in a certain way.
- In what was must the limitations be justified?

There must be a good reason to think that the limitations they want to impose will promote the educational purposes of the school.

- What kinds of limitations are acceptable?
They may limit both what the students say and how they say it.
- Do the same rules apply to student speech in all other settings?
No, but they do apply to student speech in some other settings.
- To what other settings do they apply?
To all student speech in school-sponsored speech activities.

BRAIN TEASERS

1. The rule that Justice White developed in *Kuhlmeier* applies not to all student speech but only to student speech in school-sponsored speech activities. Divide a sheet of paper into two columns. In one column give examples of student speech that occurs in school-sponsored speech

activities. In the other column give examples of student speech that occurs in school but not in school-sponsored speech activities.

2. Explain the differences between the rules applied in *Tinker* and in *Kuhlmeier*. Why did Justice White refuse to apply the *Tinker* rule to the *Kuhlmeier* situation?
3. Do you think that the outcome in *Kuhlmeier* would have been different if the *Tinker* principle had been applied? Why or why not? Explain your answer.

23. TEXAS V. JOHNSON

491 U.S. 397 (1989)

WHAT WAS THIS CASE ABOUT?

The story. Heated political protests and demonstrations, reminiscent of the widespread antiwar protests of the 1960s and 70s, ensued during the 1984 Republican National Convention held in Dallas, Texas. Many of the protesters were voicing their opposition to the policies of the administration of President Ronald Reagan. Outside Dallas City Hall, where some of the demonstrators had gathered, Gregory Lee Johnson doused a U.S. flag with kerosene and set it on fire as a means of political protest.

Johnson was arrested and charged with the desecration of a venerated object—a Texas law made it a crime to desecrate a state or national flag. Johnson was convicted and sentenced to one year in prison and fined \$2,000. The Texas Court of Criminal Appeals, however, reversed the conviction, maintaining that Johnson’s burning of the flag was actually a form of symbolic speech and, therefore, protected by the First Amendment. The state of Texas then appealed to the U.S. Supreme Court. Oral arguments were presented in March 1989. The Court announced its decision on June 21.

The question. Does the First Amendment protect the desecration of the U.S. flag as a form of symbolic speech?

The issues. The First Amendment states, in part, that “Congress shall make no law . . . abridging the freedom of speech.” What

actions, however, can be included under the term *speech*? According to the Texas Court of Criminal Appeals, which overturned Johnson's conviction, burning a flag falls under this protected term. The Texas Court stated, "Given the context of an organized demonstration, speeches, slogans, and the distribution of literature, anyone who observed . . . would have understood the message. . . . The act for which [Johnson] was convicted was clearly 'speech' contemplated by the First Amendment. . . ." The state of Texas, however, argued that its interest was in preserving the flag as a symbol of national unity and in preventing breaches of the peace. It was now up to the Supreme Court to decide the validity of Johnson's conviction.

HOW WAS THE CASE DECIDED?

In an opinion written by Justice William Brennan, the Supreme Court ruled that Johnson's conviction was inconsistent with the First Amendment. In other words, Johnson was within his constitutional rights when he burned the U.S. flag in protest. The Court's vote was five to four.

WHAT DID THE COURT SAY ABOUT CONSTITUTIONAL RIGHTS?

You have read about a similar case, *Tinker v. Des Moines Independent Community School District* (1969), in which the Supreme Court considered the First Amendment's promise of freedom of speech. In *Texas v. Johnson*, Justice Brennan concluded that Johnson's act was "expressive conduct" in that he was attempting to "convey a . . . message." Thus, his burning of the flag as a form of symbolic speech—like the students wearing armbands in Des Moines in their political protest—is protected by the First Amendment. According to Brennan, "Government may not prohibit the expression of an idea simply because society finds the idea itself offensive."

Citing the state of Texas' interest in preventing breaches of the peace and preserving the flag as a symbol of national unity, Justice Brennan stated that Johnson's expression posed no threat to the peace and that the burning of the flag did not endanger the flag's status as a national symbol. As a result, the Texas statute prohibiting the desecration of a

venerated object was declared unconstitutional and invalid.

WHAT IMPLICATIONS DOES THIS CASE HAVE FOR THE FUTURE?

As in *Tinker*, critics of the Court's ruling in *Texas v. Johnson* argued that the Court had interpreted the term *speech* too broadly. Since *Texas v. Johnson*, the Supreme Court has had other opportunities to reiterate its position that symbolic speech, or "nonverbal expression," is indeed protected by the First Amendment. In direct response to the Court's controversial ruling in *Texas*, the U.S. Congress passed the Flag Protection Act of 1989. The Supreme Court ruled this act unconstitutional in *The United States v. Eichman* (496 U.S. 310) in June 1990.

BRAIN TEASERS

1. Think of another form of "symbolic speech" that could be argued as being protected by the First Amendment. Write a brief debate expressing two opposing views.
2. Despite the opinion of the Court, do you think a person has a right to desecrate the U.S. flag as a form of protest? Why or why not?
3. In your own words, explain what Justice Brennan meant when he wrote that "We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents."

24. **BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS V. MERGENS**
496 U.S. 226 (1990)

WHAT WAS THIS CASE ABOUT?

The story. When Bridget Mergens approached Westside High School's principal in January 1985 and asked that a Bible study group be allowed to meet after school, her request was denied. Westside's associate superintendent and its superintendent agreed with

the principal's decision. Mergens appealed to the Board of Education, which also denied her request. Then a senior in the Omaha, Nebraska, high school, the 18-year-old Mergens was shocked and angry. Westside school officials cited the establishment clause of the First Amendment and the separation of church and state as the basis for its refusal to allow the Bible study group to meet at the school. Believing that her rights were being violated, the teenager set out to appeal the decision by taking legal action against the school district.

In her suit, Mergens claimed that the school district's refusal to allow a Christian club to meet at the school violated the 1984 Equal Access Act. The act forbids public secondary schools that receive federal funds and that maintain a "limited open forum" from denying "equal access" to extracurricular groups that wish to meet within that forum on the basis of the "religious, political, philosophical, or other content of the speech" at such meetings. In other words, if a public school allows one extracurricular group to meet at the school, it must allow others to meet. It cannot forbid a group from meeting even if the group is religion-oriented. Westside Community Schools countered that the Equal Access Act violated the establishment clause. The U.S. District Court for Nebraska agreed with Westside Schools, holding that the act did not apply because Westside High School did not have a "limited open forum" because all of the school's clubs were curriculum-related. The Eighth Circuit Court of Appeals, however, reversed the decision, saying that the Circuit Court was wrong in concluding that all of Westside's student clubs were curriculum-related and that the school did indeed maintain a "limited open forum." It also rejected Westside Schools' argument that the Equal Access Act violated the establishment clause of the First Amendment. The U.S. Supreme Court agreed to review the case.

The questions. Can public secondary schools deny equal access to voluntary religious clubs? Does the Equal Access Act violate the establishment clause of the First Amendment?

The issues. Over the years and amid much controversy, the Supreme Court has consistently ruled against school-sponsored prayer and other religious activities. As early as

1947, in *Everson v. Board of Education of Ewing Township*, the Court held that the establishment clause of the First Amendment requires a "wall of separation" between church and state. From the perspective of Westside Schools, a religious club meeting at the high school would be tearing down this wall.

As you know, the First Amendment forbids the government from setting up or providing for an established church. The First Amendment has also been interpreted to forbid the government from endorsing or aiding any religious doctrine. But how does the amendment apply to public schools and extracurricular activities? If other student groups can meet after school on school grounds, why is a student Bible study group prevented from doing so? To understand the arguments presented in the case, it is important to first explore the meanings of several key phrases. Was the proposed Bible study group a "noncurriculum student group," and, if so, is it entitled to "equal access"? What is a "limited open forum" as used in the Equal Access Act? In denying the religious group equal access, was the school district doing so on the basis of the group's "religious" content? The Supreme Court considered these issues and more.

HOW WAS THE CASE DECIDED?

In an opinion written by Justice Sandra Day O'Connor, the Court ruled on June 4, 1990, that the 1984 Equal Access Act does not violate the establishment clause of the First Amendment. Student religious groups, therefore, must be given the same access to public secondary schools as other noncurriculum groups.

WHAT DID THE COURT SAY ABOUT CONSTITUTIONAL RIGHTS?

In its ruling, the Court held that the term "noncurriculum student group" can be interpreted to mean any student group that is unrelated to the courses offered by the school. If the focus of the group meetings relates to subject matter taught at the school in an actual course, then the group is "curriculum related." If the school allows other noncurriculum-related groups to meet at the school, then the school maintains a "limited open forum." According to the ruling, this kind of forum requires the school to

allow equal access to all extracurricular groups.

The Court also held that applying the Equal Access Act here does not "endorse" or "advance" religion and, therefore, is not in violation of the Constitution. In other words, in providing a place for the Bible study group to meet, the high school was not supporting any particular religious view or practice. According to the Court, the Equal Access Act's requirement that student religious groups be given the same access to schools as other non-curriculum-related groups does not risk "excessive entanglement between government and religion." By denying the religious club equal access to the school, Westside was in violation of the Equal Access Act.

WHAT IMPLICATIONS DOES THIS CASE HAVE FOR THE FUTURE?

In his dissent in *Mergens*, Justice John Paul Stevens said, "Can Congress really have intended to issue an order to every public high school . . . that if you sponsor a chess club, a scuba diving club, or a French club—without having formal classes in those subjects—you must also open your doors to every religious, political, or social organization, no matter how controversial or distasteful its views may be? I think not." In the wake of *Mergens*, many school officials voiced similar views.

A public school that absolutely does not want an extracurricular religious group to meet on school premises—regardless of the group's legal right to do so—has at least two options. It can forgo all government funding, which would remove its status as a "public school." Or, it can abolish all of its extracurricular groups, which would mean that the school no longer maintained a "limited open forum." It is doubtful whether any public school would choose either option.

BRAIN TEASERS

1. Your school does not offer a course that teaches the game of chess. A group of students wishes to form a chess club that will meet on school grounds after regular school hours. There are other extracurricular clubs that meet at your school. Does the proposed chess club fall under the protective guidelines of the 1984 Equal Access Act? Why or why not?

2. Review the comment made by Justice Stevens in his dissent. Do you agree or disagree with Justice Stevens? If you were a Supreme Court justice hearing *Mergens*, how would you have voted?
3. How did the Supreme Court address the issue of separation between church and state in this case?

25. BOARD OF EDUCATION OF KIRYAS JOEL VILLAGE SCHOOL DISTRICT V. GRUMET 114 U.S. 2481 (1994)

WHAT WAS THIS CASE ABOUT?

The story. New York's Village of Kiryas Joel is home to more than 10,000 members of the Satmar Hasidic religious sect, a strict form of Judaism. The Satmars have been compared to the Amish in that they shun most modern conveniences and wear distinctive clothing. The Satmars employ strict interpretations of the Torah, speak Yiddish as their first language, and have special dietary restrictions. To escape religious persecution, the Satmars migrated during this century from the Romanian border town of Satu Mare, from which the group's name originates.

Once an undeveloped subdivision of Monroe, New York, Kiryas Joel was incorporated as a self-governing village in 1977. When it seceded from Monroe, Kiryas Joel's boundaries were drawn to include only Satmar families. The village's children attended private religious schools. Because these schools could not adequately accommodate Kiryas Joel's more than 100 children with disabilities, in 1989 the state created a public-school district specifically for these children. Citing the First Amendment, Louis Grumet, then president of the New York Association of School Boards, challenged the legality of a state-funded district created to serve the children of a religious group. The state of New York ruled against the Kiryas Joel School District. The Supreme Court heard the case in March 1994.

The question. Did the New York state legislature act constitutionally when it established a

state-funded school district for the children with disabilities of the Village of Kiryas Joel, a religious enclave?

The issues. This was not the first time that the fate of Kiryas Joel's children with disabilities was in the hands of the Supreme Court. The Monroe-Woodbury Central School District's attempt to provide special services to these children was discontinued after the Court's ruling in *Aguilar v. Felton* (1985) declared that public-school teachers could not be sent into private religious schools. After *Aguilar*, some Satmar families tried sending their children to Monroe's nearby public schools, but the children were "traumatized" by ridicule from non-Satmar children. When the families then claimed that their children were legally entitled to special programs currently unavailable, the state created a special school district for the Village of Kiryas Joel.

The key issues in *Kiryas Joel v. Grumet* were the children's entitlement to receive needed special programs, the First Amendment's establishment clause, which calls for the separation of church and state, and the role of the state in accommodating religion to "alleviate special burdens."

HOW WAS THE CASE DECIDED?

In an opinion written by Justice David Souter, the Supreme Court ruled that in creating a special school district for a religious enclave incorporated as a village to exclude all but its practitioners, New York violated the establishment clause of the First Amendment.

WHAT DID THE COURT SAY ABOUT CONSTITUTIONAL RIGHTS?

Justice Souter wrote that "The Constitution allows the state to accommodate religious needs by alleviating special burdens...." This, however, "is not a principle without limits.... Neutrality among religions must be honored." Justice Souter's argument against Kiryas Joel centered on the establishment clause of the First Amendment, which ensures that a state act with neutrality toward religion. In other words, a state cannot favor "one religion over another" or "religion to irreligion." There was no way of knowing whether another group in a similar situation would be granted the same privilege as Kiryas Joel. In addition, according to the Court, the Village of Kiryas Joel had

other alternatives to pursue to alleviate its "burden." For example, the Monroe-Woodbury Central School District could legally offer an appropriate program at a "neutral" site to serve the children with disabilities.

Justice Kennedy noted a "fine line between the voluntary association that leads to a political community comprised of people who share a common religious faith, and the forced separation that occurs when the government draws explicit political boundaries on the basis of peoples' faith."

WHAT IMPLICATIONS DOES THIS CASE HAVE FOR THE FUTURE?

While the government cannot "endorse" or "advance" religion, it must also protect the rights of all, regardless of religion. Some people believe that the Supreme Court contradicts itself in its efforts to abide by these tenets. In his dissent, Justice Antonin Scalia echoed that criticism: "The Founding Fathers would be astonished to find that the Establishment Clause—which they designed 'to insure that no one powerful sect . . . could use political or governmental power to punish dissenters'—has been employed to prohibit . . . American accommodation of the religious practices . . . of a tiny minority sect. . . . Once this Court has abandoned text and history as guides, nothing prevents it from calling religious toleration the establishment of religion." The case of *Kiryas Joel* made it clear that a religious group cannot be granted its own government-funded school district. What will continue to be debated is whether the government's obligation to protect the rights of all is counter to the Court's ruling.

BRAIN TEASERS

1. Do you think the state of New York erred in setting up a public-school district for the children with disabilities of the Village of Kiryas Joel? Why or why not?
2. Explain how this Supreme Court case relates to the constitutional concept of separation of church and state.
3. Do you think there is truth in Justice Scalia's dissenting argument that the Court could someday call "religious toleration the establishment of religion"? Explain your answer.

**26. MADSEN V. WOMEN'S
HEALTH CENTER, INC.
114 U.S. 2516 (1994)**

WHAT WAS THIS CASE ABOUT?

The story. In September 1992, after antiabortion protesters continued to picket and demonstrate outside the Women's Health Center, a Melbourne, Florida, abortion clinic, a Florida state court issued an injunction to prevent the protesters from blocking or interfering with public access to the facility and from abusing persons leaving or entering the clinic. Six months later, when protesters continued to impede access to the clinic, distribute antiabortion literature, chant using bullhorns and loudspeakers, and harass clinic workers at their homes, the clinic's operators sought to broaden the injunction. A doctor testified that the protesters' actions endangered the health of patients by causing added stress or by causing patients to delay clinic appointments.

The Florida Circuit Court amended the injunction, creating a 36-foot buffer zone around the clinic's entrances and driveway and around private property to the north and west of the building. It placed restrictions on excessive noise and the use of "observable images," such as offensive photographs. It also created a 300-foot buffer zone around clinic workers' residences.

The protesters claimed that the amended injunction violated their First Amendment right to freedom of speech. The Florida Supreme Court upheld the Circuit Court's decision. Before the state's Supreme Court decision was announced, however, the Florida Court of Appeals heard a separate challenge to the same injunction. The Appeals Court struck down the injunction, ruling that the concerns for public safety and order were protected under already established laws and that there was no need to infringe upon the First Amendment rights of others. To resolve the dispute between the Florida Supreme Court and the state's Court of Appeals regarding the constitutionality of the Circuit Court's amended injunction, the U.S. Supreme Court agreed to hear the case.

The question. Did a Florida Circuit Court's amended injunction against antiabortion protesters outside a central Florida abortion clinic

violate the protesters' First Amendment right of freedom of speech?

The issues. In resolving the dispute the U.S. Supreme Court had to examine the arguments presented by both courts. For example, in upholding the amended injunction, the Florida Supreme Court had found it to be a "content neutral" restriction on free speech rather than the "content-based" restriction asserted by the Court of Appeals. According to the Florida Supreme Court, the restrictions were not directed at the protesters' antiabortion message but at their actions. The U.S. Supreme Court also had to determine whether the injunction "burdens no more speech than necessary to serve a government interest." The Court analyzed each provision of the amended injunction to determine its constitutionality.

HOW WAS THE CASE DECIDED?

In an opinion written by Chief Justice William Rehnquist, the Supreme Court ruled that the establishment of a 36-foot buffer zone from which demonstrators are excluded "passes muster under the First Amendment, but several other provisions of the injunction do not." In other words, the Court upheld parts of the amended injunction and struck down other parts.

WHAT DID THE COURT SAY ABOUT CONSTITUTIONAL RIGHTS?

In its decision, the U.S. Supreme Court:

- upheld the 36-foot buffer zone around the clinic's entrances and driveway, ruling that it did not burden more speech than necessary to protect access to the clinic, but struck down the buffer zone around the private property to the clinic's north and west;
- upheld the injunction's noise restrictions, noting that "The First Amendment does not demand that patients undertake Herculean efforts to escape the cacophony of political protests";
- struck down the ban on "images observable" as an unreasonable restriction, pointing out that the clinic could "pull its curtains";
- struck down a 300-foot buffer zone around staff residences, ruling that it "sweep[s] more broadly than necessary."

The Court agreed with the Florida Supreme Court that the injunction was “content neutral,” ruling that “none of the restrictions imposed by the court were directed at the . . . message.” In short, the Court’s majority opinion stated that while antiabortion protesters have a right to free speech, that right cannot infringe upon the well-being of others and, in the context of the injunction, must be limited. According to the Court, “The combination of the governmental interests identified by the Florida Supreme Court—protecting a pregnant woman’s freedom to seek lawful medical or counseling services, ensuring public safety and order, promoting the free flow of traffic, . . . protecting . . . property rights, and assuring residential privacy—is quite sufficient to justify an appropriately tailored injunction.”

WHAT IMPLICATIONS DOES THIS CASE HAVE FOR THE FUTURE?

In striking down the amended injunction, the Florida Appeals Court called the dispute “a clash between an actual prohibition of speech and a potential hindrance to the free exercise of abortion rights.” The Supreme Court’s 1973 ruling in *Roe v. Wade* gave women the legal right to abortion. The questions to consider

relative to cases like *Madsen* include: Is a woman’s right to an abortion impeded by protesters who block entrances to abortion clinics, harass physicians and other medical personnel, and threaten the health of women by causing added stress? Do such actions not interfere with a woman’s constitutional right to privacy expressly mentioned in *Roe v. Wade*? As you have learned, efforts to overturn the Court’s decision in *Roe v. Wade* are ongoing. These efforts likely will result in more cases like *Madsen*.

BRAIN TEASERS

1. Write two brief paragraphs. In one paragraph, express the view of a doctor working at the clinic. In another, express the view of an antiabortion protester who supports demonstrations near entrances to abortion clinics.
2. The Court found that the injunction was “content neutral.” In other words, the injunction did not attack the antiabortion message voiced by the protesters but the methods used to voice the message. Do you agree with this finding?