

The Supreme Court in American Life

The U. S. government has three branches. Two of them are very well known. These are the legislative branch (Congress) and the executive branch (the President and federal agencies).

The third branch, the judicial branch, is a little mysterious to most people. The judicial branch is composed of the federal courts. It is a separate branch of government, created by Article III of the Constitution. The role of the courts is to decide legal cases. In doing that, courts apply the laws and the Constitution. They have to interpret these laws—that is, decide exactly what the language of law means. Courts also have to decide whether these laws are consistent with the Constitution. If they are not, the courts will declare that the laws are unconstitutional and strike such laws down. That is, the courts will declare that all or a portion of these laws are void—as if they had never existed.

This power to decide the constitutionality of a law is called judicial review. It is the courts' greatest power. Because of their ability to declare laws of Congress and actions of the President unconstitutional, the courts have a place as a co-equal branch of government.

The United States Supreme Court is at the head of the federal court system. It is our nation's highest court. The Supreme Court has the authority to hear appeals from the lower federal courts. If necessary, it can reverse their rulings. The Court also has the power in certain circumstances to hear cases that began in the state courts. The Supreme Court can reverse the rulings of state courts and even state supreme courts that conflict with the Constitution. The United States Supreme Court is truly the most important court in the country.

The judges on the Supreme Court are called justices. The Supreme Court is composed of nine justices—a Chief Justice and eight associate justices. Congress has the power to pass laws that determine the number of justices. Congress has changed this number several times throughout American history. There were originally six justices on the Court. The number has been set at nine since 1869.

The President nominates the Chief Justice and the other justices. The Senate must confirm them (agree that they should become justices) before they can begin to serve. Thus the legislative and executive branches have control over who becomes a justice. However, once the nominations are confirmed and the justices named to the Court, the Constitution tries to assure that they are independent of the other two branches. The Constitution gives Supreme Court justices (and other federal judges) life tenure. That means they can serve until death, or until they choose to retire. They can only be removed from office by impeachment, after they are convicted of committing certain crimes. In all of American history no Supreme Court justice has ever been removed from office by impeachment. Moreover, the salaries of the justices and other federal judges can't be reduced while they are in office. This means that Congress can't punish them for making unpopular decisions by reducing their pay.

The Constitution gives the Supreme Court the authority to hear certain kinds of cases. If the Court has jurisdiction (authority to hear a case), the parties that have lost their case in a lower court can file a request for a Supreme Court hearing. If the Court agrees to hear their case, the parties have the chance to get that loss overturned. If the Court turns the parties down, their case is very probably over. The decision of the lower court will stand.

The Supreme Court does not have to hear every case it is asked to hear. In fact, the Court chooses to hear very few cases. In recent decades it has heard only about 80 to 90 cases a year, which it selects from about 7,000 requests. These are typically the cases that the Court believes raise the most important issues.

How Does the Court Decide a Case?

When the Court agrees to hear a case, it asks the lawyers for the parties (the people or organizations involved) to file written arguments. These arguments are printed in booklets that are limited to 50 pages. In these documents (called briefs) the lawyers say why the law or the Constitution supports their position. People and groups who are not involved in the case but have an interest in the outcome can also file briefs. These people are called *amici curiae* (Latin for “friends of the court”). Their briefs are called amicus briefs.

After reading the parties’ briefs, the Court hears their oral arguments. Each side is usually given 30 minutes to explain why the law supports their position. The justices often ask the lawyers questions to clarify their arguments. They also often ask the lawyers to explain how a decision one way or the other would affect other cases that might arise in the future.

The Supreme Court does not permit the attorneys to introduce evidence or produce witnesses at oral argument. This is because the Court does not set out to decide “the facts” in any case before it. Instead, the justices typically accept as true the fact findings made by the lower courts. This frees the Court to review just the legal questions in the case.

In the weeks (and sometimes months) after oral argument, the justices meet to discuss the case. These meetings are private. The justices share their views on the case, discuss the law that applies to the case, and eventually vote on how the case should be decided.

If the decision is unanimous (that is, if every justice agrees), the Chief Justice will either write the opinion or appoint one of the other justices to write it. The opinion gives the decision of the Court and the reasoning behind the decision. If the decision is not unanimous, the majority opinion will give the decision and the reasoning. One or more of the justices who did not agree (the dissenters) will write an opinion discussing how they think the case should have been decided. This is called a dissenting opinion.

There is a third type of opinion. It is the concurring opinion. It is written by a justice who agrees (concurs) with the majority’s decision to affirm or reverse the lower court, but not with the majority’s reasons for doing so. Such a justice may write a “concurring” opinion explaining the justice’s view of the case.

The Court and the Other Branches

Is the Court a weak branch or a strong branch? Those who think it is a weak branch could point out that the justices are not elected, so that they can’t claim to speak for the people. They can’t issue opinions on issues whenever they want. They can only decide actual legal cases that they have been asked to hear. That means they don’t have complete control over their “docket.” Even if the justices all agree on a point, they can’t express it until it comes up in a case that they have been asked to decide.

One of the Founders, Alexander Hamilton, pointed out another reason why the Court might not be viewed as powerful. In the *Federalist Papers* (#78), he wrote that the judicial branch is “the weakest of the three departments of power.” Hamilton said that the judiciary controlled neither the budget nor the military. The judiciary “may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even [to carry out] its judgments.” Sometimes Presidents have been reluctant to enforce the Court’s orders. President Andrew Jackson is supposed to have said after one decision he did not like, “[Chief Justice] John Marshall has made his decision. Let him enforce it.”

Perhaps in recognition of this weakness, until 1935 the Court did not have its own building. Congress has the Capitol. The President has the White House. For most of its history, the Court had just a few rooms in the Capitol, with Congress getting most of the space.

Introduction

But the Court in many ways is a very powerful branch of government. “It is very quiet here,” said Justice Oliver Wendell Holmes, “but it is the quiet at the eye of the storm.” Though the Court does not speak on every issue, in the cases it decides, it has the final word. Congress may pass a bill. The President may sign it into law. But if the Court says it is unconstitutional, it is as if the law never existed. And the justices can’t be voted out of office. They can’t be fired.

The justices draw their strength from the Constitution. They have the final authority to determine what it means and how it applies. Yes, Congress can try to pass a new law to get around a problem the Court found in an earlier law. However, that new law itself may come before the Court and be struck down. Yes, the Constitution can be amended, but that has happened only a few times in more than 200 years.

Periods When the Court Has Been Powerful

The strength of the Court depends on its members, and especially on its Chief Justices. John Marshall was the Court’s first great Chief Justice. He served on the Court for almost 35 years, but his greatness had more to do with his leadership than with the length of time he served.

John Adams, who had been defeated for re-election, appointed Marshall Chief Justice in early 1801, just before he left office. The political party of Adams and Marshall, the Federalists, never again held power. In fact, the party no longer existed in the last 20 years that Marshall was on the Court. That means that Marshall had to lead justices who had been named by presidents who were not sympathetic to Marshall’s political beliefs. Nonetheless, he did lead them, brilliantly. Most of the great decisions of the Marshall Court were unanimous, and were written by Marshall himself.

These decisions

- established the Court’s power to declare laws unconstitutional (judicial review)
- established the Court’s right to review and reverse state court decisions in certain circumstances
- interpreted the Constitution broadly, to give the federal government powers over interstate commerce and more authority in conflicts with the states

Though he did not help write the Constitution, Chief Justice John Marshall is rightly considered one of the Founders. More than anyone, he is responsible for establishing the authority of the Supreme Court as equal with the legislative and executive branches.

Probably the Court made the most impact on American life under Chief Justice Earl Warren. Warren came from California. He was governor of that state in 1953, when President Eisenhower nominated him to be Chief Justice. Warren retired from the Court in 1969. He served only half as long as Marshall, yet under his leadership the Court handed down many decisions that reshaped American law and American life. Of the 25 key cases we cover in this book, the Warren Court decided several, including

- *Brown v. Board of Education*, which struck down school segregation
- *Baker v. Carr*, which paved the way for major changes in Congressional and legislative districts
- *Engel v. Vitale*, which struck down organized prayer in the schools
- *Miranda v. Arizona*, one of a long series of decisions that reshaped criminal law
- *Tinker v. Des Moines*, a landmark case that established the constitutional rights of students

The Warren Court used the Equal Protection Clause and the Due Process Clause of the 14th Amendment to strike down many, many state laws. These broad decisions greatly affected schools, the police, politics, race relations, and other areas that touched the lives of all Americans.

Introduction

The Warren Court's decisions were controversial at the time. Many, such as the school prayer decision, are still controversial. Critics of the Warren Court charge that it went too far. They say that the Court should have left many of these matters to local authorities to decide. They say that many of the problems addressed by the Court in these cases could have been better taken care of through the political process, by new laws passed by the legislature. Warren's defenders point out that the Constitution is the supreme law of the land. The decisions of the Warren Court, they say, upheld the Constitution and moved our nation closer to its great ideals of justice and equality.

Conclusion

Though the Court is making fewer landmark decisions today than it was under Earl Warren, it has decided some very important cases. Examples include its decision forcing President Nixon to hand over tapes that led to his impeachment and the 2000 case of *Bush v. Gore*, in which the Court's decision determined who would be President.

The balance between the branches is not static. We can't predict how the relationship of the branches will play out in the future. But one thing is certain. The U.S. Supreme Court will continue to influence the course of American history and the lives of Americans.

How to Use This Book

The core of this book is 25 of the most important Supreme Court cases. Each is discussed in two pages. Questions and activities follow each case. In our discussion of many cases, we refer you to other important cases that you will find online. Simply access www.abanet.org/publiced/resources for brief discussions of these cases.

If you want to explore cases further, you can find them online in many sites. For brief summaries of a case and the full decision, access <http://supct.law.cornell.edu/supct/> or <http://www.findlaw.com/cascode/supreme.html>. To use these sites you just need to put in one of the names in the case (for example, "Lochner" for *Lochner v. New York*). Or you can put in the case citation. This simply tells you where you might find a case in a book that collects the Court's decisions. For example, the citation for *Lochner* is 198 U.S. 45 (1905). We give you the full citation of each case in this book's table of contents.

Case 1: Marbury v. Madison (1803)**Judicial Review****THE ISSUE** Who should decide whether a law is constitutional?**WHAT'S AT STAKE?**

Whether the U.S. Supreme Court can strike down laws that are not consistent with the Constitution.

FACTS AND BACKGROUND

In 1800, Thomas Jefferson won the presidential election. President John Adams lost. Before Jefferson was inaugurated, Adams nominated 42 of his supporters as justices of the peace for the District of Columbia.

The new justices of the peace could not take office until they received a signed and sealed document called a *commission*. John Marshall, the acting secretary of state, did not have time to deliver all of the commissions. Soon after Jefferson took office, he found that some of the commissions had not been delivered. He ordered James Madison, the new secretary of state, not to deliver them.

William Marbury was one of the people who did not receive his commission. Marbury asked the Supreme Court for a special order, called a *writ of mandamus*, to force Madison to deliver the commission. The Constitution lists the types of cases that the Supreme Court can hear. The list does not include cases where a person is seeking mandamus. But the Judiciary Act (1789) said that people could go directly to the Supreme Court to seek this kind of order. *Marbury v. Madison* began in the Supreme Court.

The Chief Justice of the Supreme Court was John Marshall, the same man who had failed to deliver Marbury's commission. Marshall was a political opponent of Jefferson. Marshall and the Court faced a difficult decision. If the Court ordered Madison to deliver Marbury's commission, Jefferson and Madison would likely ignore the order. The Court would look weak. If the Court denied Marbury's claim, it would look like it was backing down to the President.

THE DECISION

The vote on the Court was unanimous. Chief Justice Marshall wrote the Court's opinion. He said that Marbury had a legal right to receive his commission. Furthermore, Madison's refusal to deliver it violated that right. But then Marshall did something surprising.

Marshall wrote that the Judiciary Act conflicted with the U.S. Constitution. The Constitution listed the types of cases the Supreme Court could hear. The Judiciary Act added to that list. When two laws conflict, Marshall wrote, the courts must decide which law to follow. The Constitution is the supreme law of the land. As a result, the Court declared that the Judiciary Act was unconstitutional.

In his decision, Chief Justice Marshall gave up the Court's power to hear the types of cases listed in the Judiciary Act. Instead, Marshall claimed a far greater right for the Court—the power of judicial review. He wrote,

It is emphatically [definitely] the province [role] and duty of the judicial department to say what the law is... If two laws conflict with each other, the courts must decide on the operation of each.

IMPACT OF THE DECISION

Judicial review means that the judiciary is able to check the power of Congress and the President. Judicial review makes the Supreme Court one of the three great branches of government. This power is essential to the checks and balances of our system. It has been used often in the past 200 years.

QUESTIONS

1. Without the power of judicial review, who would decide whether laws were constitutional? What problems might arise if the same branch of government both passed laws and decided if they were constitutional?

2. Do you think that nine judges should be able to decide whether laws created by an elected body are unconstitutional? Explain your answer.

FIND OUT

What types of cases can the Supreme Court hear?

Case 2: McCulloch v. Maryland (1819)**Federalism**

THE ISSUES Does the Constitution give Congress the power to establish a national bank? If so, does the Constitution allow Maryland to tax that bank?

FACTS AND BACKGROUND

Congress set up the Bank of the United States in 1816. The states opposed it because their own state banks were losing business to it. Several states placed heavy taxes on branches of the national bank. These national bank branches refused to pay those taxes.

For example, in Maryland, the branch of the national bank refused to pay Maryland state taxes. The Maryland state government sued the bank's cashier, James McCulloch. In 1819, the case reached the Supreme Court.

THE DECISION

Every Justice on the Court agreed that the Constitution *did* allow Congress to establish a national bank. They also agreed that it did *not* allow Maryland to tax the bank.

Writing for the Court, Chief Justice Marshall pointed out "The government proceeds directly from the people.... Its powers are granted by them, and are to be exercised [used]... for their benefit." Thus the U. S. Constitution is superior to ordinary laws, including laws passed by the states. If a state law conflicts with the Constitution, it cannot be valid.

Implied Powers Article I, Section 8, of the Constitution lists the powers of Congress. It does not include or exclude the power to charter a bank. It also states that Congress may make all laws that are "necessary and proper" for carrying out the listed powers. Marshall said that many important powers are listed in the Constitution, and the rest can be "deduced" [implied] as necessary to carry out the listed powers. Certainly, a national bank helps the government carry out such listed powers as collecting taxes, borrowing money, and supporting armies and navies. Therefore, the Constitution permits it.

Federal Supremacy 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 involves the power to destroy." The states could try to tax the mail, the federal courts, and the army. 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 are the "supreme law of the land." *Supremacy* means

McCulloch v. Maryland, *continued***Federalism**

being of the highest authority or rank. A *clause* is a specific section in a document. The Constitution binds judges in every state, even if state law conflicts with the Constitution. If a state law conflicts with the Constitution, that law cannot be valid.

WHY THE CASE IS IMPORTANT

This case contains two important principles.

The principle of implied powers The Court greatly expanded what the Constitution allows the federal government to do. Today, Congress has many “implied powers” that allow it to make laws that are “necessary and proper” to carry out its listed powers.

The principle of national supremacy The federal Constitution and federal laws come before the constitutions and laws of the states. When the federal government is using powers that belong to it, the states must give way.

QUESTIONS

1. Where in the Constitution can you find the principle of implied powers? The principle of national supremacy?

2. What are the advantages to Marshall’s “broad” interpretation of the Constitution? What are its disadvantages?

FIND OUT

In 1819, many people believed that the Constitution should be interpreted narrowly. They believed Congress had no implied powers. Others believed the Constitution should be interpreted broadly to give Congress implied powers. Can you find other examples of this debate in our history?

ONLINE EXTRA

Daniel Webster was the winning lawyer in *McCulloch v. Maryland*. He argued an astonishing 249 cases before the Court, including the Dartmouth College case (see online discussion).

Case 3: Gibbons v. Ogden (1824)**Federalism**

THE ISSUE What is the proper balance between the states and the federal government under the Constitution's Commerce Clause?

FACTS AND BACKGROUND

In 1824, New York law said that no one could operate a steamboat on any of the state's waterways without first getting a state license. Aaron Ogden had such a New York license. It gave him a monopoly [exclusive control] on using New York waters. Nevertheless, Thomas Gibbons began operating a ferry between Manhattan and New Jersey. Gibbons didn't have a New York license, but he did have a federal "coasting" license. Ogden sued to stop Gibbons from operating his boats in New York waters. The state courts upheld Ogden's monopoly on running steamboats in New York.

Gibbons appealed to the U.S. Supreme Court. He argued that the New York law was *void* [not valid] under the Commerce Clause of the Constitution.

The Commerce Clause (Art. I, Sect. 8) says that Congress has the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." In *Gibbons v. Ogden* the Court had to interpret its meaning.

The first question was did "commerce" only include buying and selling goods, or did it cover things like operating passenger ships? Secondly, if the Commerce Clause gave Congress the power to regulate passenger ships between states, could the states still enforce their own laws in this area?

THE DECISION

Chief Justice Marshall wrote the opinion of the Court. His opinion struck down the New York law under the Commerce Clause. Marshall wrote that in drafting a Constitution, the Framers wanted to rescue commerce from "embarrassing and destructive consequences, resulting from the legislation of so many different States, and to place it under the protection of a uniform law."

Marshall pointed out the problems posed by the overlapping and conflicting state laws in this case. Under New York law, no one could navigate any of the state's waters by steamboat *without* a New York license. But under the law of Connecticut, no one could enter Connecticut waters with a steam vessel that *had* such a New York

Case 3: Gibbons v. Ogden, *continued***Federalism**

license. Marshall's opinion held that the Commerce Clause prevents states from enforcing such conflicting laws.

What is "Commerce"?

Marshall reasoned that commerce was more than buying and selling goods. "The mind can scarcely conceive a system for regulating commerce ... which shall exclude all laws concerning navigation." Thus, under the Commerce Clause, Gibbons' federal license rendered the New York monopoly void.

What Role Do the States Have?

This important question was left undecided by Marshall's opinion. For example, would such a state law as New York's have been valid if there had *not* been a conflicting federal license? When there is no federal law, can a state write laws to fill the void?

Marshall was sympathetic to the view that the Commerce Clause gave Congress sole power to regulate commerce between the states. Under this interpretation, while the Clause does not authorize Congress to regulate purely *intrastate* commerce (that is, commerce taking place wholly within one state's borders), only Congress can regulate commerce between the states. Today, Congress does regulate commerce between the states, while each state regulates commerce within its own borders.

QUESTION

1. How did this decision strengthen the power of the federal government and weaken the power of the states?

FIND OUT

1. What was commerce between the states like under the Articles of Confederation? What problems occurred?
2. Read the New Deal cases in this book. What was the debate over the Commerce Clause during the New Deal of the 1930s? How did it turn out?

THE DECISION

The Supreme Court reversed the missionaries' convictions. Chief Justice Marshall said all Congressional laws and treaties giving the Cherokees their rights "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive." Marshall said that Georgia laws had no force in Cherokee Nation territory.

THE IMPACT OF THE DECISION

Because of this decision, states must respect tribal sovereignty. Today, Indian nations have much more sovereignty than cities or counties, though less than foreign nations. Historically, the case is best known for its tragic aftermath. The missionaries remained in jail until eventually "pardoned" by the governor. More importantly, President Andrew Jackson refused to enforce it. He was determined to seize tribal territory east of the Mississippi River.

The federal government eventually persuaded about 500 of the 17,000 Cherokee in Georgia to agree to a new treaty. On the basis of this treaty, the entire Cherokee Nation, including the women, children, and the elderly, were forced at gunpoint to march 1,000 miles in the winter of 1838–1839. They went to so-called "Indian Territory" west of the Mississippi. Some 4,000 Cherokee died along this trail, known in Cherokee as "The Trail Where They Cried" and in English as "The Trail of Tears."

QUESTIONS

1. If an Indian reservation lies within a state's boundaries, why can't a state simply enforce its laws on the reservation just like it can anywhere else in the state?

2. How can a state be forced to follow a Supreme Court decision with which it disagrees?

ONLINE EXTRA

Read the online case of *United States v. Lara*. What did this case say about the authority of an Indian tribe to enforce its own laws? How is this similar to what the Court said in *Worcester v. Georgia*?

Rights of African Americans

Case 5: Dred Scott v. Sandford (1857)

THE ISSUES Does the Constitution give an African American the right to sue in federal court? Does the Constitution allow Congress to make a law that takes slaves away from people who bring them into a free territory?

WHAT'S AT STAKE

The case was important for all Americans. In 1857, the country was bitterly divided over slavery. Many historians think the Court tried to resolve the slavery question by deciding this case.

FACTS AND BACKGROUND

In 1833, John Emerson purchased a slave named Dred Scott. Emerson later took Scott to the Wisconsin Territory. Slavery was illegal in Wisconsin Territory under the Missouri Compromise (1820). Scott believed that because he had lived for years on free soil, he should be free.

In 1848, the United States won the war against Mexico. The boundaries of the nation now stretched clear to California. Clearly, the issue of slavery in new territories had to be settled. In 1852, after six years in the courts, the Supreme Court of Missouri ruled against Scott. By 1856, Scott's case finally went to the Supreme Court. Because the issues it raised were so important, the Court asked the parties to argue the case twice. In *Brown v. Board of Education* (1954), another key case about race in America, the Court also requested two arguments.

THE DECISION

The Court ruled that African Americans could not sue in federal court. It also ruled that Congress did not have the power to make a law taking slaves away from people who bring them into a free territory.

Race and citizenship Chief Justice Roger Taney wrote the decision for the majority of seven justices. Two other justices *dissented* [disagreed]. Taney's opinion reflected the prejudices of the day. He said that African Americans had "none of the rights and privileges" of citizens. This statement applied not only to slaves, but also to free blacks.

The chief justice ignored an important fact. In many states, blacks were considered state citizens. Under the Constitution, the federal courts have jurisdiction over a number of kinds of suits involving state citizens. Dred Scott's suit involved actions between citizens of different

states. 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.

Slavery The Fifth Amendment says that nobody may be “deprived of life, liberty, or property, without due process of law.” The chief justice reasoned that because slaves are “property,” slaves cannot be taken away without “due process of law.” That is, slaves cannot be “taken away” without a fair trial before an impartial court. According to the chief justice, a law taking away slaves that have entered a free territory cheats slave owners of their due process rights. Thus the Missouri Compromise was unconstitutional.

HOW DO BAD DECISIONS GET OVERRULED?

Historians generally consider *Dred Scott* to be the worst Supreme Court decision of all time. Fortunately, this case is no longer good law. It has been overruled. The Supreme Court has the power to overrule itself. A constitutional amendment can also overrule a decision.

Dred Scott v. Sanford was so controversial that it hastened the coming of the Civil War. With the South defeated, Congress passed the 14th Amendment (1868), which guaranteed African Americans citizenship and overruled the *Dred Scott* decision.

QUESTION

1. 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?

2. How might Taney’s opinion have been different if the Supreme Court had ruled that African Americans were entitled to the rights and privileges of citizens?

FIND OUT

What kinds of suits involving state citizens can federal courts hear?

Case 6: Civil Rights Cases (1883) Private Discrimination

THE ISSUE Under the Constitution, can Congress pass a law preventing private businesses from discriminating against people because of their race or color?

WHAT'S AT STAKE

Whether Americans can be discriminated against in their daily life.

FACTS AND BACKGROUND

After the Civil War (1861–1865), Congress passed the Civil Rights Act of 1875. The Act made it a crime to deny to anyone the “full and equal enjoyment” of railways and other transportation. It also required that all people be treated equally in hotels, theaters, and other places of public amusement. The law applied to people of every race and color, regardless of any previous condition of *servitude* [slavery]. Under the Act, privately owned businesses could not discriminate, either.

Some private business owners did not obey the law. They discriminated against African Americans. The U.S. Supreme Court combined and heard five such cases and issued one decision.

THE DECISION

The eight-member majority struck down the law. Justice Joseph P. Bradley wrote the opinion. In the Court’s view, the 14th Amendment (which outlawed discrimination by a state) did not authorize the Act. “Individual invasion of individual rights is not the subject-matter of the amendment,” Bradley wrote. “The wrongful act of an individual . . . is simply a private wrong.” Congress could pass a law prohibiting a *state* from violating individual rights. It could not pass a law prohibiting private individuals or businesses from discriminating.

Bradley then turned to whether the 13th Amendment (which outlawed slavery) authorized the Act. Wasn’t private discrimination against former slaves a *badge* [mark] of slavery? The Court said that it was not. Bradley’s opinion added that such a broad reading of the 13th Amendment would make a freed former slave “the special favorite of the laws.”

THE DISSENT

Justice John Marshall Harlan was the only dissenter. He said the majority was wrong. To Harlan, the 13th Amendment should be read broadly to give Congress the power to ensure the rights of freed people. Harlan said that

Case 6: Civil Rights Cases, *continued***Private Discrimination**

private discrimination was a “badge of slavery” that Congress had a right to outlaw under the 13th Amendment. “It is not the words of the [amendment] but the internal sense of it that makes the law,” he wrote. “The letter of the law is the body; the sense and reason of the law is the soul.”

THE IMPACT OF THE DECISION

The decision helped usher in the “Jim Crow” era of discrimination against African Americans. (During the Jim Crow era, roughly the 1880s to the 1950s, African Americans, Hispanics, and Native Americans were segregated and suffered discrimination.) The justices said that *states* could outlaw discrimination, and some did eventually. But many states did not act. Businesses were free to discriminate. Not until the Civil Rights Act of 1964 did a federal law outlaw private discrimination.

HARLAN: THE GREAT DISSENTER

Justice John Marshall Harlan was a Kentuckian who had owned slaves. However, on the Court he became a great defender of equal treatment for all races. He wrote his blistering dissent in the *Civil Rights Cases* with the same pen and inkwell that Chief Justice Taney had used to write the *Dred Scott* decision. (Taney argued that African Americans had no rights. Harlan believed they had equal rights.) In *Plessy v. Ferguson* (1896) he was again the only dissenter.

QUESTION

1. What do you think Justice Harlan meant by “The letter of the law is the body; the sense and reason of the law is the soul”?

2. Do you think the amendment outlawing slavery also outlaws discrimination? Why or why not?

ONLINE EXTRA

Read the online case of *Heart of Atlanta Motel v. United States*. In it, the U. S. Supreme Court ruled on whether the Civil Rights Act of 1964 was constitutional. What did the Court decide? What was its reasoning? What provision of the Constitution did the Court base its decision on?

**Case 8: Plessy v. Ferguson (1896) and
Brown v. Board of Education (1954)****Equal Protection**

THE ISSUES In *Plessy*, whether racially segregated railroad cars violate the Equal Protection Clause of the 14th Amendment. In *Brown*, whether racially segregated public schools violate that clause.

WHAT'S AT STAKE?

What “equal protection of the laws” means for all Americans.

FACTS AND BACKGROUND

The 14th Amendment is one of several amendments passed soon after the Civil War. These amendments were designed to guarantee the freedom of African Americans and to protect them from unfair treatment. The 14th Amendment’s Equal Protection Clause reads: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” But just what does this forbid? That’s the key question for both cases.

Plessy v. Ferguson began in 1890 with a new Louisiana law. It said all railway companies in the state should provide “separate but equal” accommodations for white and African American passengers. To test the law, Homer Plessy refused to leave a white coach and was arrested. He argued that the law was unconstitutional.

Brown v. Board of Education began in 1950, when the National Association for the Advancement of Colored People tried to bring an end to segregation in the public schools. *Brown* included appeals from four separate states: Kansas, Delaware, South Carolina, and Virginia. School conditions in these four states varied. There were stark differences in South Carolina between the “colored” and “white” schools. In Topeka, Kansas, the schools were more equal. In all four states, however, the schools were segregated by law.

THE DECISIONS***Plessy v. Ferguson***

In *Plessy*, the Supreme Court held that segregation was acceptable if the separate facilities provided for blacks were equal to those provided for whites. The sole dissent came from Justice Harlan. He said, “in the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens.... Our constitution is color-blind, and neither knows nor tolerates classes among citizens.” Justice Harlan accurately predicted further “aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens.”

Case 8: Plessy and Brown, *continued***Equal Protection*****Brown v. Board of Education***

Chief Justice Earl Warren wrote the decision in *Brown* for a unanimous Court. He said that segregation of the public schools was unconstitutional. Even if the schools were equally new and the teachers equally paid, segregation in schools caused harm to African Americans. It marked them with a badge of inferiority. "We conclude that in the field of public education the doctrine of 'separate but equal' has no place," he wrote. "Separate educational facilities are inherently unequal."

THE IMPACT OF THE DECISIONS

Plessy created the legal doctrine of "separate but equal" that permitted racial segregation in the United States. African Americans and other people of color were sentenced to second-class citizenship. They were separated from whites in schools, stores, and restaurants.

Brown changed all that. It was a landmark in the struggle for equality under the law for all Americans. A few years after *Brown*, segregation by law was eliminated almost everywhere. It took more than 50 years, but eventually Justice Harlan's dissent became the law of the land.

QUESTIONS

1. What do you think Justice Harlan meant when he said that our Constitution is color blind?

2. What do you think Justice Warren meant when he wrote "Separate educational facilities are inherently unequal"?

FIND OUT

1. In the 60 years between *Plessy* and *Brown*, were schools and other facilities actually equal?
2. Schools are no longer segregated by law, but are often segregated as a result of being located in segregated neighborhoods. Is that a problem for learning? If so, what can be done about it?

**Case 10: New Deal Cases
(1935, 1937)****Federal Regulation of Businesses**

THE ISSUE To what extent the Commerce Clause of the U.S. Constitution permits the federal government to regulate businesses?

WHAT'S AT STAKE?

The role of the states and the federal government in regulating business.

FACTS AND BACKGROUND

President Franklin D. Roosevelt and Congress tried to fight the Depression of the 1930s with many new programs and laws. This campaign to fight the Depression was called "The New Deal."

Congress felt it had authority to pass laws to improve the economy under the Constitution's Commerce Clause (Art. I, Sec. 8). Congress can regulate businesses that cross state lines, such as railroads and airlines, but can Congress regulate businesses that operate entirely within a state? Some people felt that these *intrastate* businesses could be regulated only by the state in which they were located.

The Supreme Court had to decide whether Congress had broad power to regulate businesses or a narrower power that applied only to certain types of businesses. The Court defined Congress's regulatory power in two important cases.

Schechter Poultry Corp. v. U.S.

The National Industrial Recovery Act (1933) was one of the first New Deal laws. In 1935, a case reached the Supreme Court that asked whether it was constitutional. The Schechter Poultry Company was accused of violating parts of the law that dealt with employees' pay and hours.

The company operated only in New York City. Though its poultry came from outside the state, the company said it was a local business. It argued that Congress did not have the power to make it pay employees a certain wage or give employees a set time off from work.

NLRB v. Jones and Laughlin Steel Corp.

In 1937, the Court was faced with another Commerce Clause case. The National Labor Relations Act guaranteed the right of workers to organize unions. A steel company was accused of violating the law. The company claimed that the Act should be thrown out because Congress did not have the authority under the Commerce Clause to pass it.

Case 10: New Deal Cases, continued**Federal Regulation of Businesses****THE DECISIONS**

In the *Schechter* case, the Court agreed with the company and struck down the recovery law. In the *NLRB* case, it disagreed with the company and let the labor law stand.

The *Schechter* decision was unanimous. Chief Justice Charles Evans Hughes wrote the opinion. He said that the transactions in the case—wages and salaries and working hours—were local. These transactions did not have a “direct” effect on interstate commerce. The state could regulate such transactions, but the federal government could not.

In *NLRB*, the Court upheld the constitutionality of the labor law. The decision was 5–4. Chief Justice Hughes wrote for the majority. He said that the government could protect the right of workers to organize unions. Allowing workers to organize unions might prevent strikes that would hamper interstate commerce. Hughes dropped the distinction between “indirect” and “direct” effects on commerce made in *Schechter*. Under the *NLRB* ruling, an indirect effect would be enough to make a federal law governing interstate commerce constitutional.

THE IMPACT OF THE DECISIONS

Schechter was one of many decisions tossing out New Deal laws. In 1936, President Roosevelt was overwhelmingly re-elected. Early in 1937, he proposed a law that would add six new members to the Court. (Congress can change the number of justices.) This would enable him to appoint these six new justices. His proposal never became law, but in *NLRB*, the Court began to uphold New Deal laws.

Whatever the reason for the change, ever since its decision in *NLRB*, the Court has generally approved laws even indirectly affecting interstate commerce. This gives the federal government a great deal of power.

FIND OUT

1. Read about *Gibbons v. Ogden*. What did the Court say about the Commerce Clause there? Did that decision give more or less power to the federal government?

ONLINE EXTRA

Read the online discussion of *U.S. v. Lopez* (1995). What did the Court say about the Commerce Clause there? Did that decision give more or less power to the federal government?

Case 11: Korematsu v. U.S. (1944)**Racial Discrimination**

THE ISSUE Did the government violate the Equal Protection Clause of the 14th Amendment by singling out a racial group and forcing its members to leave their homes and move to camps hundreds of miles away?

WHAT'S AT STAKE?

For Japanese-Americans during World War II, whether they could be free of restrictions imposed only on them. More broadly, can the government use race directly and openly in making laws and rules?

FACTS AND BACKGROUND

In World War II, Japan fought on the side of Germany, Italy, and the Axis Powers. When the war began, about 112,000 Japanese-Americans lived on the West Coast; 70,000 of them were American citizens. After the United States entered the war in 1941, the U.S. military thought that these people might not be loyal to the U.S. In 1942, the military ordered most of the Japanese-Americans to move to special camps, called *internment camps*, far from their homes. The military was concerned they would commit sabotage and hurt the war effort.

Fred Korematsu, a Japanese-American and an American citizen, did not go to the camps as ordered. Korematsu was arrested and sent to an internment camp in Utah. He sued, claiming that the government acted illegally when it sent people of Japanese descent to camps.

THE DECISION

By a 6–3 margin, the Supreme Court said the orders were constitutional. Justice Hugo Black wrote the opinion for the Court. He said that the highly unusual demands of wartime security justified the orders. However, he made it clear that distinctions based on race are “inherently suspect.” Laws and rules that are based on race must withstand “strict scrutiny” by the courts. “All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . Pressing public necessity may sometime justify the existence of such restrictions; racial antagonism never can.”

Justice Robert H. Jackson was one of the dissenters. He wrote that Korematsu was “convicted of an act not commonly a crime . . . being present in the state [where] he is a citizen . . . and where all his life he has lived.” Jackson said the *Korematsu* decision was a “loaded weapon” that might be used again if the country is attacked.

Case 11: Korematsu v. U.S., continued**Racial Discrimination**

Justice Frank Murphy also dissented. He said the military order reflected racial prejudice. He said the government should have conducted investigations to find out who was disloyal. It had done that with people of German and Italian ancestry. Instead, the government just rounded up almost everyone who was Japanese, without knowing who was loyal and who was not.

THE IMPACT OF THE CASE

The Japanese-Americans lost the case, but more than 40 years later, the U.S. passed a law that apologized to them. The law said that the government had been fundamentally unjust to have locked them up in camps. Thanks to the law, some Japanese-Americans received money to compensate them for what they had lost. In 1998, President Clinton awarded Fred Korematsu the National Medal of Freedom.

Though the case went against the Japanese, the strict scrutiny standard continues to guide the Court. *Strict scrutiny* means that using a suspect classification, such as race or gender, in a law would be unconstitutional unless the government can justify it as a *compelling* [very important] public interest. The government must also show that its action was narrowly tailored to advance this compelling interest. The strict scrutiny test is a very difficult standard for a law to meet. The Court has used this test in many cases, including the affirmative action cases *Gratz v. Bollinger* and *Grutter v. Bollinger*.

QUESTIONS

1. How did the Court justify the military orders that sent Japanese to camps? Do you agree with the Court?

2. What alternative did Justice Murphy prefer to the military order? Do you agree with him?

FIND OUT

1. Read about the affirmative action cases covered in this book. How did the Court in those cases apply the standards it had announced in *Korematsu*?

Case 12: Mapp v. Ohio (1961)**Search and Seizure**

THE ISSUE Can evidence that police seized as a result of an illegal search be admitted in a state trial?

WHAT'S AT STAKE

Criminal *defendants* [people charged with a crime] are concerned whether state courts must exclude evidence that police seized illegally. This raises an important issue for all Americans—how can we enforce the Constitution when it does not specify a remedy if constitutional provisions are not followed?

FACTS AND BACKGROUND

The Fourth Amendment to the Constitution says Americans are “secure . . . against unreasonable searches and seizures.” It doesn’t say, however, exactly what an “unreasonable” search is. Nor does it say what happens when police find evidence as a result of an unreasonable search.

Searches aren’t always reasonable. And sometimes illegal searches do turn up evidence that could help convict someone of a crime. At first, courts generally admitted illegally seized evidence. They reasoned that the individual’s rights under the Fourth Amendment were secondary to the needs of justice. But that changed in a 1914 case, *Weeks v. United States*. The Supreme Court said that Weeks’ Fourth Amendment rights had been violated by an illegal search. The Court held that the evidence could not be used against Weeks.

The *Weeks* decision set the standard for federal courts. The “exclusionary rule” announced in that case meant that illegally-seized evidence could not be used in federal courts. State courts were free to admit or not admit such evidence. The *Mapp* case asked whether state courts should follow the federal rule.

The case began when the police in Cleveland, Ohio, were looking for a fugitive suspected in a bombing case. They got a tip that he was hiding in Dollree Mapp’s house. She refused to let them in. After surrounding the house, they broke down a door and began a search. They had a piece of paper that they claimed was a search warrant, but they didn’t let her read it and didn’t produce it later. They didn’t find the fugitive, but in a trunk in the basement they found obscene material and jailed Mapp for that. She was convicted. She lost her appeal to the Ohio Supreme Court, though the court concluded that the search was “unlawful.” Then she appealed to the U.S. Supreme Court.

THE DECISION

The Court ruled in favor of Mapp. The vote was 5-3. Justice Tom Clark wrote for the majority. "All evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court," he wrote. He said that the 14th Amendment's guarantee that states would not violate due process required that the exclusionary rule [that illegally seized evidence not be used] be applied to the states.

Justice John Marshall Harlan II (grandson of the great dissenter) wrote for the minority: "I would not impose upon the states this federal exclusionary remedy. . . The states should be free to follow it or not as they themselves determine."

THE IMPACT OF THE DECISION

The decision was controversial. It affected courts all over the United States. Many people were concerned that "[t]he criminal is to go free because the constable [police officer] has blundered." Others followed Justice Clark in saying, "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws."

QUESTIONS

1. Look at the Fourth Amendment and decide whether the search of Mapp's house was unreasonable. If so, what should have been done about it?

2. In the *Mapp* decision, Justice Clark said that there was "no war between the Constitution and common sense." What do you think he meant? Do you agree? Why or why not?

3. In your opinion, what is more important—protecting the individual's rights or protecting society? Explain your answer.

Case 15: Gideon v. Wainwright (1963)**Right to a Lawyer**

THE ISSUE Under the Constitution, is a poor person accused of a serious crime guaranteed the free assistance of a lawyer?

WHAT'S AT STAKE?

For the thousands of poor people accused of crime each year, the right to have a more even playing field with the prosecution.

FACTS AND BACKGROUND

Clarence Earl Gideon was accused of breaking and entering into a Florida poolroom and stealing money. When Gideon's case came to trial he could not afford to hire a lawyer. He asked that the court supply him with one for free. The judge refused. Gideon conducted his own defense but was found guilty. While in prison, Gideon handwrote a document called a writ. It asked the U. S. Supreme Court to review his case. He claimed that by refusing to appoint a lawyer to help him, the Florida court had violated his right to a lawyer.

Because of his poverty, the Supreme Court allowed him to file his document for free. When the Court accepted the case, it appointed a lawyer to represent him before the Court. His lawyer was Abe Fortas, who later became a Supreme Court justice.

Fortas argued that the Sixth Amendment, which guarantees people the right to a lawyer in criminal trials, applied to the states because of the 14th Amendment. The 14th Amendment says that no state "shall deprive any person of life, liberty, or property without due process of law." ("Due process" includes trial by jury and other procedures that make trials fair.) Fortas said that depriving Gideon of a lawyer made his trial unfair and violated his right to due process.

THE DECISION

By a 9-0 margin, the Court agreed with Gideon. Justice Hugo Black wrote for the Court. He pointed out that the Sixth Amendment says that "the accused shall enjoy the right . . . to have the Assistance of Counsel [a lawyer] for his defense." The Sixth Amendment applies to the federal courts. The Supreme Court had held in previous cases that defendants in federal court had to have a free lawyer if they wanted one. Many states had passed laws giving accused people the right to a free lawyer. In this decision, the Court held that, because of the 14th Amendment, all states must make free lawyers available. Justice Black

said that it was an “obvious truth” that “assistance of counsel” is necessary for a fair trial in any court.

Black pointed out that “governments . . . spend vast sums of money . . . to [prosecute] defendants.” If we are to achieve the goal that “every defendant stands equal before the law,” then we must recognize that defendants need lawyers to present their side of the case and balance the scales of justice. In Black’s words, “lawyers in criminal court are necessities, not luxuries.” Gideon got a new trial, with a lawyer to defend him. The lawyer was able to call new witnesses and cast doubt on the prosecution’s witnesses. Gideon was acquitted in this trial.

THE IMPACT OF THE DECISION

Gideon was one of several Supreme Court cases that extended the right to a lawyer. One said that lawyers had to be made available even in trials for minor crimes (misdemeanors) that might involve jail time. The Court held in another case that free lawyers must be available to help defendants pursue their right to appeal their conviction.

Today, all states either have public defenders who defend poor people or have a system where courts appoint a lawyer for each defendant who needs one. Some people say that the playing field is still uneven. Prosecutors’ offices are generally larger and have more resources than public defender offices. Nonetheless, now no defendant has to go to court without a lawyer.

QUESTIONS

1. What does the Sixth Amendment say about the right to a lawyer? Do you think these words require free lawyers for poor people accused of a crime? How else does the Sixth Amendment help assure fair trials?

2. What does the 14th Amendment say about due process? Does due process require free lawyers for poor people accused of a crime?

Case 16: Miranda v. Arizona (1966) Right to Remain Silent

THE ISSUE Does the Constitution require police to tell people in custody of their right to remain silent and their right to an attorney?

WHAT'S AT STAKE?

Constitutional requirements that police everywhere must follow.

FACTS AND BACKGROUND

In 1963, a woman was kidnapped in Arizona. Ernesto Miranda was arrested for the crime and taken to the police station. He was 23 years old, poor, and had limited education. The officers took Miranda to a room to question him. After a short time, he gave a detailed confession.

At Miranda's trial, the officers testified that Miranda had given the confession without any threats or force. The officers admitted that they had not told Miranda about his rights to silence or legal assistance. Miranda was found guilty and sentenced to a long prison term. After the Arizona Supreme Court upheld his conviction, Miranda appealed to the United States Supreme Court.

THE DECISION

By a bare 5-4 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 rights promised to him by the Fifth and Sixth Amendments.

Chief Justice Earl Warren wrote for the majority. He pointed out that the Fifth Amendment says that no person "shall be compelled in any criminal case to be a witness against himself." This means that defendants in a criminal case can't be required to testify at their trial. The issue here was whether the Fifth Amendment requires police to inform people of their right to remain silent when they were in police custody.

Warren's opinion held that it did. He noted that the "very fact of custodial interrogation exacts a heavy toll . . . and trades on the weakness of individuals." *Custodial* means that someone is arrested, or at least "deprived of his freedom of action in any significant way."

Warren also wrote that not informing Miranda of his right to have legal help had deprived him of his Sixth Amendment right to "have the assistance of counsel for his defense." Miranda also had the right to know that he had the right to a free lawyer if he could not afford one. So to meet the requirements of the Fifth and Sixth Amendments, people

in custody would have to be told of their rights. Police now do this routinely.

If police fail to give the Miranda warnings, judges will rule that what people in custody 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. Other evidence may be used in court, such as the testimony of witnesses. In fact, at his second trial, Miranda was convicted on other evidence.

THE IMPACT OF THE DECISION

Miranda was one of the most controversial cases in Supreme Court history. Many people thought that the result would make it harder to convict people because fewer people would confess. However, studies have shown that confession rates have changed little because of the decision.

THE MIRANDA WARNINGS

Anyone who has seen TV cop shows has heard some variation of these warnings over and over again. All are based on the *Miranda* decision. They may differ slightly from place to place. Here is a sample:

1. You have the right to remain silent;
2. Anything you say can and will be used against you;
3. You have the right to talk to a lawyer before being questioned and to have a lawyer present when you are being questioned; and
4. If you can't afford a lawyer, one will be provided for you before any questioning if you want one.

QUESTIONS

1. What rights of the individual does the Fifth Amendment protect? The Sixth Amendment?

2. Do you think giving a Miranda warning helps protect those rights? Why or why not?

**Case 17: Tinker
v. Des Moines (1969)****Free Expression for Students**

THE ISSUE Under the First Amendment, can school officials prohibit students from wearing armbands to symbolize political protest?

WHAT'S AT STAKE

The extent to which all American public school students can take part in political protests in their schools.

FACTS AND BACKGROUND

Some students in Des Moines, Iowa, decided to wear black armbands to protest the Vietnam War. Two days before the protest, the school board created a new policy. It stated that any student who wore an armband to school and refused to remove it would be suspended.

Three students wore armbands and were suspended. They said that their First Amendment right to freedom of speech had been violated. They sued the Des Moines Independent Community School District. In 1969, the United States Supreme Court decided their case.

THE DECISION

By a 7-2 margin, the Court agreed with the students. Justice Abe Fortas wrote for the majority. He said that students do not "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate."

Fortas admitted that school officials had the right to set rules. However, their rules had to be consistent with the First Amendment. That Amendment states that "Congress shall make no law . . . abridging [limiting] the freedom of speech." The Court had held in previous cases that under the 14th Amendment, state and local governments (including school boards) must follow the First Amendment.

Fortas's opinion held that wearing an armband symbolizing political protest was a form of speech called symbolic speech. Symbolic speech is conduct that expresses an idea. Even though the protest did not involve spoken words (called pure speech), it did express an opinion. It was a form of expression protected in the same way as pure speech.

The Court had said in previous cases that free speech does not mean that someone may speak anywhere, at any time, or in any way. You can't turn a loud speaker to full volume and wake up a neighborhood at four in the morning. In this case, Des Moines school officials thought their rule was justified. They feared that the protest would disrupt learning.

Case 17: Tinker v. Des Moines, continued**Free Expression for Students**

Fortas wrote that student symbolic speech could be punished, but only if it really disrupts education. In actuality, only a few students out of 18,000 wore armbands. There was little or no disruption. Fortas wrote that officials couldn't pass a rule out of a general fear of disruption. Unpopular views may create unpleasantness. That's part of living in a free society.

Fortas also noted that the officials allowed students to wear other political symbols, such as political campaign buttons. By singling out armbands, officials appeared to stifle a particular point of view. Courts are suspicious of rules that seem to target a particular message.

THE IMPACT OF THE CASE

Tinker remains the law of the land, but later cases, with different facts, often have permitted school officials to exercise more control. In *Hazelwood School District v. Kuhlmeier* (1988), the Court upheld a school principal who had removed two pages from a student newspaper before it was published. He was concerned that the pages violated the privacy of some students. The First Amendment guarantees freedom of press. However, the Court noted that students don't automatically have the rights adults do in other settings. The school newspaper was part of a journalism course and was sponsored by the school. As a result, educators "are entitled to exercise greater control . . . to assure that participants learn whatever lessons the activity is designed to teach." The tensions between constitutional guarantees and the special circumstances of schools will continue to be played out in future cases.

QUESTION

1. Should teenagers in school have as much freedom of speech as adults? Why or why not?

ONLINE EXTRA

What did the Court decide in *Bethel School District v. Fraser* (1986)? How did its decision in *Bethel* compare to its decision in *Hazelwood School District v. Kuhlmeier*? Do you agree with the Court's decisions? Explain your answer.

**Case 18: New York Times
v. United States (1971)****Freedom of Press**

THE ISSUE Under the First Amendment, can the government stop a newspaper, in wartime, from publishing articles that the government claims are harmful to national security?

WHAT'S AT STAKE?

Whether the New York Times could continue to publish articles that were critical of the government's conduct during the Vietnam War. The broader issue is when, if ever, the government has the right to prevent a story from being published.

FACTS AND BACKGROUND

In 1971, the country was bitterly divided over the Vietnam War. Some people in the Defense Department had access to classified documents. The documents showed that secrecy and deception marked the beginnings of the Vietnam War. Daniel Ellsberg gave the documents, which became known as the Pentagon Papers, to the New York Times. The newspaper began to publish a series of stories based on the Pentagon Papers.

After the third article was published, the federal government tried to stop the newspaper from finishing the series. This is called *prior restraint*. Prior restraint is when the government tries to stop the publication of something before it is published.

The case moved very rapidly. The government asked a court for a temporary restraining order that would halt publication. The court granted the order and stopped publication of the articles. The newspaper appealed immediately. Because of the national importance of the case, the Supreme Court agreed to bypass the appeals court. The Supreme Court heard the case a few days later. Four days after that, the Court issued its decision.

THE DECISION

By a 6-3 majority, the Court denied the government's request for an order stopping publication. Quoting previous cases, the Court said that "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." The government "carries a heavy burden of showing justification for the imposition of such a restraint." The Court held that in this case the government had not met its burden. The articles could be published.

The six justices in the majority had differing reasoning. Three justices said that the courts should never allow the government to stop publication. They said that the First Amendment is very clear. Under it, "the press must be left free to publish news, whatever the source, without censorship, injunctions or prior restraints." To give the government the power to stop publication would "wipe out the First Amendment and destroy the fundamental liberty and security of the very people the government hopes to make secure."

Three other justices said that prior restraint was not justified in this case. However, they wouldn't go so far as to say that it was never justified. They noted that the government understandably wanted these documents not to be published. Yet they felt that the documents, though embarrassing to the government, were not harmful to national security.

The three dissenters said that the First Amendment does not guarantee an absolute right to publish. They pointed out that Article II of the Constitution gives the president powers in foreign affairs, which should include the power to prevent stolen documents from being published. They also noted the case had been very rushed, and that the Court did not have enough time to fully decide the merits of the controversy. Finally, they pointed out that materials used for the stories were stolen and given to the newspaper, which raised issues under criminal law.

THE IMPACT OF THE DECISION

The articles continued to be published. The government tried unsuccessfully to prosecute Daniel Ellsberg, but the prosecution was not successful. In the end, the case was a victory for freedom of the press.

QUESTIONS

1. Read the First Amendment. Do you think it forbids all prior restraint? Explain your answer.

2. Do you think that the government should have the power of prior restraint in some circumstances? If so, when? Explain your answer.

Case 20: United States v. Nixon (1974) Executive Privilege

THE ISSUE Does the Constitution give the president an absolute right to keep certain information private?

WHAT'S AT STAKE

The investigation of the Watergate scandal was at stake. So was the future of Richard Nixon's presidency. The broader issue was to what extent presidents have an "executive privilege" to keep some information completely private.

FACTS AND BACKGROUND

In 1972, burglars were caught breaking into the headquarters of the Democratic National Committee at the Watergate Hotel. Their mission was to install "bugs" for listening in on the Democratic party's telephone conversations. The burglars were linked to President Richard Nixon's re-election campaign organization.

As Congress investigated the break-in in 1973, many witnesses claimed that the president was trying to cover up his involvement. One witness revealed that Nixon had secretly tape-recorded every conversation that had ever taken place in his office.

By April 1974, criminal charges had been filed against seven members of Nixon's administration. The special prosecutor in the case asked Nixon to let him hear the tapes. Nixon refused. The prosecutor asked the federal district court for help. The judge ordered Nixon to release the tapes to the court for secret examination. Nixon disobeyed. This caused a constitutional crisis—a tug of war between two branches of government. Could a president defy a federal judge?

Nixon claimed that as president, he had an executive privilege of keeping presidential communications confidential. Nobody could override it for any reason. Nixon claimed that a president had a right to refuse to testify in court or provide information requested by other branches of government. The right of executive privilege is not mentioned in the Constitution. For years presidents had claimed a right to it in foreign relations for national security reasons.

Because of the urgency of the case, the United State Supreme Court agreed to skip over the Court of Appeals, which would normally have heard the first appeal, and settle the case right away.

THE DECISION

The decision was unanimous. Chief Justice Warren Burger wrote for the Court. He said that the president's executive privilege is not absolute. Nixon had to turn over the tapes.

Nixon had argued that the separation of powers requires the executive and judicial branches to be totally independent. The chief justice rejected this claim. Under the separation of powers, the Constitution gives each 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.

Nixon's second argument was that communications between the president and his advisers need to be confidential for the sake of the public good. Burger admitted that sometimes confidentiality, or secretiveness, is important. When communications are about diplomatic or military secrets, confidentiality might be necessary. But when communications concern other subjects, confidentiality might not be important at all. Burger concluded that the need for confidentiality must be balanced against competing needs on a case-by-case basis.

In this case, said Burger, finding the truth requires that courts have all the evidence they need, even if it includes presidential communications. When the need to find out the truth in the Watergate trial was weighed against President Nixon's need for confidentiality, confidentiality lost.

THE IMPACT OF THE DECISION

Nixon turned over the tapes. The evidence on the tapes showed that he had been part of the cover-up. As a result, Nixon had to resign. The long-run impact is that the Court set some guidelines. It clearly said that there is no such thing as an absolute executive privilege. The president's need for confidentiality must be weighed against competing needs, such as the needs of the criminal justice system. In disputed cases, federal courts may do this weighing.

QUESTION

1. "Executive privilege" is mentioned nowhere in the Constitution. Was the Court right to say that other words in the Constitution gave this power to presidents? Why or why not?

Case 22: Bush v. Gore (2000)**Presidential Election**

THE ISSUE Should 60,000 ballots that could not be read by voting machines be recounted by hand to determine whether a voter intended to cast a vote for George W. Bush or Al Gore in the 2000 election?

WHAT'S AT STAKE?

The presidency of the United States. The question was whether George Bush or Al Gore won the 2000 presidential election. The broader issues are the ability of the Supreme Court to overrule the decisions of state courts on state laws, and the ability of an appointed judiciary to affect the result of democratic elections.

FACTS AND BACKGROUND

The presidential election between Democrat Gore and Republican Bush on November 7, 2000, was very close. Whoever won the state of Florida would be the next president.

People voted in Florida by punching a hole in a ballot card. The votes were then counted by a machine, which detected the holes. The machines in Florida showed that Bush had won the state by a few hundred votes. On November 26, Florida's Election Commission declared the election in favor of Bush.

However, 60,000 ballots were not counted because the machines could not detect a hole in the voting card. In some of these ballots, there was an indentation or "dimple" where the voter tried to punch a hole. In other ballots, a voter had almost made a hole, and there was a piece of paper, or "hanging chad," hanging from the hole. Al Gore argued in the Florida Supreme Court that these votes, called *under-votes*, should be recounted by hand. On December 8, 2000, the Florida Supreme Court agreed and ordered counties to recount all under-votes. If a voter's intent to choose Bush or Gore could be clearly determined from the ballot, then the vote would be added to the totals for Bush or Gore.

Bush appealed to the United States Supreme Court on December 9. The Court made an order to stop the recounts while it made a decision. The Court handed down a decision on December 12, 2000.

THE DECISION

The Supreme Court voted 5-4 to end the hand recount of under-votes ordered by the Florida Supreme Court.

The majority pointed out that the Florida Supreme Court had ordered a recount without giving much guidance to vote-counters on

what was a valid vote. Some counters counted votes on dimpled ballots; some only counted votes with hanging chads. The Supreme Court said that the inconsistency in methods of counting votes meant that votes were treated *arbitrarily* [based on a person's choice, rather than on standards]. This lack of standards, said the Court, violated the Due Process and Equal Protection Clauses of the Constitution.

Five justices said that under Florida law, the vote had to be finalized by December 12. They said that rules for re-counts could not be properly formulated in that time, and so they ordered election officials to stop re-counting votes.

In a highly unusual move, the majority in the unsigned 5-4 decision said that this case should not be used as precedent in future cases: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes involves many complexities."

In one dissent, Justices David Souter and Stephen Breyer agreed with the majority that the lack of standards on what votes to count meant that the re-counting process was not valid. However, they thought Florida courts should have a chance to create standards so that a recount could be conducted before the Electoral College met on December 18. In another dissent, Justices John Paul Stevens and Ruth Bader Ginsburg said that the decision of the Florida Supreme Court was reasonable, and that the U.S. Supreme Court should respect it.

THE IMPACT OF THE DECISION

As a result of the Supreme Court's decision, George W. Bush received Florida's electoral votes, and was declared President-elect of the United States on December 18, 2000.

QUESTION

1. Why did the majority in the U.S. Supreme Court believe that the Florida Supreme Court's order was unconstitutional?

FIND OUT

Did an unelected body ever before decide a presidential election? If so, when? What was the result?