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 nation-wide 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 passengers. 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.

Miranda v. Arizona, 1966

A kidnapping and sexual assault occurred in Phoenix, Arizona, in March 1963. On March 13 Ernesto Miranda, 23, was arrested in his home, taken to the police station, identified by the victim, and taken into an interrogation room. Miranda was not told of his rights to counsel prior to questioning. Two hours later, investigators emerged from the room with a written confession signed by Miranda. It included a typed disclaimer, also signed by Miranda, stating that he had "full knowledge of my legal rights, understanding any statement I make may be used against me," and that he had knowingly waived those rights.

Two weeks later at a preliminary hearing, Miranda again was denied counsel. At his trial he did have a lawyer, whose objections to the use of Miranda's signed confession as evidence were overruled. Miranda was convicted of kidnapping and rape, and received a 20-year sentence.

1. What rights does Miranda believe are being violated? Which amendments contain these rights?

2. Why does Miranda believe these rights were violated?

3. What might Miranda have done differently when dealing with the police if he knew his rights?

4. Do you think that it is the responsibility of the government to inform people when they are being arrested of their rights? Explain!

5. If you were a Supreme Court Justice would you rule in favor of Miranda or Arizona? EXPLAIN.

Tinker v. Des Moines, 1969

In December 1965, Marybeth and John Tinker planned to wear black arm bands to school signifying their protest of the Vietnam War. School officials became aware of the plan beforehand and adopted regulation banning the wearing of such armbands. Failure to comply with this regulation would result in suspension until the student returned to school without the armbands. Both Tinkers went ahead and wore the black armbands to school. They were suspended and told not to return with the armbands. The Tinkers claimed that their rights of free speech and expression, which are protected under the First Amendment of the Constitution of the United States, had been violated, and that they should have been allowed to attend school wearing the armbands.

1. Why were the students wearing armbands to school?

2. How can wearing an armband be viewed as freedom of speech?

3. Why would the school system not want the students to wear the armbands?

4. What would the student's argument be for wearing them? (Not why they are wearing them but rather why they think it should be okay to do so.)

5. If you were 1 of the _____ Supreme Court Justices ruling on this case would you vote in favor of the students (Tinker) or the school district (Des Moines)? Explain your decision.