



Curriculum Units by Fellows of the Yale-New Haven Teachers Institute
1982 Volume III: The Constitution in American History

Sources of Law: Related Cases for the Language: Minority Student

Curriculum Unit 82.03.05
by Steven Strom

Introduction

This is a six to ten week unit designed to introduce the middle school student to various sources of United States law and several important concepts of United States government. The students will become familiar with the concepts of “checks and balances”, executive, legislative, and judicial; constitutional law; statutes; regulations of federal agencies; dual system of courts; equal protection and due process. The students will study a series of cases designed to generate active student participation through activities such as a questionnaire survey. A major objective of the unit will be to improve the students’ communication study skills.

This social studies unit is designed to be used with middle to low ability middle school school students. It is hoped that sufficient curriculum materials can be developed in Spanish so that this unit may be used in a bilingual social studies classroom. The selection of cases to be studied has been especially tailored for the language minority student. It is hoped that similar units can be developed relevant to the needs of other interest groups.

Because many middle school students are reading well below grade level, with writing skills lagging even further behind, many reading and writing activities will have to be teacher designed based on individual need. Specifically, dictations will be given to improve native and second language skills. Copying, directed drill, letter writing, and note taking will be used as tools to improve writing skills. Interviews will be conducted and the interview technique will be utilized to integrate all communication skills, listening, speaking, reading, and writing.

Why are we concentrating on communications skills in a social studies classroom? Time is essential for teachers. With a six hour day, the student is actively participating in class only for three to four hours a day. Two things must be done at once. While teaching content matter, sufficient practice must be provided for the student to work to improve his reading and writing skills and develop his vocabulary.

The unit will focus on several important Supreme Court cases to specifically illustrate different sources of law. The unit will emphasize *concepts* of United States history, not the typical memorization of dates and names. The unit will attempt to satisfy the gap left by simplistic textbook approaches to United States government. An example of such an approach would be to say that the United States is a democracy, that democracy is

government of the people, by the people and for the people, and giving no further elaboration.

This unit will differ in approach from most United States history textbooks, which present a chronological narrative of the presidents, by highlighting the changing nature of the balance of power among the executive, legislative, and judicial branches. The unit will try to de-emphasize the traditional method of focusing on the personality of the man who is president, the Washington, Adams, Jefferson, . . . Lincoln, the Roosevelts, Kennedy, Nixon, etc. This unit will serve to reaffirm the opinion given by Chief Justice Marshall in 1803:

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. ¹

The unit can be divided up into three general parts. The first part, United States government, provides the student with background information about the specific powers of Congress, the States, the Supreme Court, and President. It defines certain terms and introduces concepts that will be the foundation for parts II and III. Part two will attempt to illustrate various sources of law through the study of specific documents. Part three is the case materials section, which can provide two to five weeks of lessons depending on the class, the teacher, and the materials available.

Outline of Unit Presentation

I. United States Government

A. What kind of government is it?—Democracy

1. What does democracy mean?—free elections, one party/two party system

B. What is the actual structure of the government?

Checks and balances—What does this mean?

1. executive—Who is in this branch?

- a. the cabinet
- b. powers of president

2. legislative—Congress, Senate, House of Representatives

- a. can pass laws which affect executive, and judiciary
- b. How a bill becomes a law
- c. Powers of Congress

3. judicial—Supreme Court

- a. dual system of courts—structure of federal courts and state courts
- b. Who has jurisdiction?

II. Sources of Law—besides the Supreme Court, federal courts and state courts, there are several different sources of law.

A. The Constitution of the United States

1. The Bill of Rights
2. additional amendments
 - a. specific attention to 14th amendment—equal protection, due process, grants

Congress power to enforce by legislation

B. Laws passed by Congress

1. Judiciary Act of 1789—organized court system
2. Civil Rights Act 1866

3. Civil Rights Act 1964
 4. Equal Educational Opportunity Act 1974
 5. authorizes other government agencies to make rules and regulations
- C. Federal Regulations
1. What is a regulation?
 2. What is its source of authority?
 3. Regulation A 1964—Department of HEW
 4. HEW task force findings re: Lau v. Nichols
 5. 35 Fed. Reg. 11595 (1970)—affirmative steps rectify language deficiency
- D. State Constitutions
1. Connecticut—the Constitution State
 - a. review colonial history and first written constitutions
 2. right to an education written in many state constitutions, see:
 - a. “Rodriguez revisited—federalism, meaningful access and the right to an adequate education” Santa Clara Law Review 20:75 Winter 1980
 3. New Mexico constitutional provisions
 - a. Serna v. Portales
- E. Laws passed by state legislatures
1. can be different in different states
 - a. drinking age, driving age
 2. examine bilingual education laws of Connecticut, Massachusetts, New York, California, Texas, and New Mexico
 3. discussion of welfare laws, disparities
 4. school financing, equalization formulas
- F. ordinances passed by cities, towns, and other local governments
1. examples of local laws—parking rules, traffic.
 2. school districting and school board policy
- G. Court Decisions—precedent; and important source of constitutional law
- I. Marbury v. Madison—the right to judicial review
- III. Case Materials
- A. Marbury v. Madison
 - B. Meyer v. Nebraska 1923
 1. the right to work, to right of pupils to knowledge, the power of parents over a child’s education
 - C. Mendez v. Westminster—1946—separate but equal is inherently unequal, in the case of Mexicans in segregated schools
 - D. Lau v. Nichols—statutory decision in favor of bilingual education
 - E. Serna v. Portales—constitutional decision in favor of bilingual education
 1. pedagogically correct in analysis of various kinds of bilingual education programs available
 - F. The Bilingual Education Act
- IV. Sample Lessons
- A. Lesson One
 1. Sources of Law
 - a. general discussion
 - b. classification + definition of sources

B. Lesson Two

1. Sources of Law

- a. role playing
- b. students make homework rules for class

C. Lesson Three

1. Bilingual Education

- a. students practice social studies research skills

V. Bibliographies

Background Material

Most discussion of United States government begins with the question, "What kind of government is it?" The simple answer that is usually given is, "A democracy." When this discussion develops the teacher may get such responses as, "a democracy is where you have a right to vote." It should be pointed out to students that the right to vote does not necessarily constitute democracy, especially in the case of one party elections. One might ask, "What does free elections mean?"

A student may provide the answer that a democracy is where the people can elect a president. This type of response indicates the popular perception of the President being the Government of the United States. Another student might parrot, "a government of the people, by the people, and for the people" without really knowing what that means.

The concept of government of the people is embodied in the two houses of Congress, the House of Representatives and the Senate. In the abstract, perfect democracy would mean each citizen would have the right to govern, make laws, and determine affairs of state. Since uniting two hundred million people from the fifty states would be impossible, the people elect Senators and Representatives to speak for them in Washington.

It is important to teach that the United States government is one of checks and balances. That is to say that the three branches of government, the executive, legislative, and judicial exist in some sort of continual ebb and flow of power. This process of change does not exist in a vacuum, but responds to the general political mood of the electorate of the United States.

What actually determines the structure of the United States government? The United States Constitution confers the legislative power on the Congress, determines the composition of the Congress and describes the rights and duties of Senators and Representatives. The Congress has the power to pass laws which at times affect the executive and judicial branches of government. The Constitution confers the executive power on the president. The President of the United States is elected every four years and may be reelected for a second term of four years. The qualifications for President are described in the Constitution, as are his powers and obligations. The judicial power is invested in a Supreme Court and a system of federal district and circuit courts.

Although the Constitution gave form and substance to the Federalists' notion of a republican government, it could still not be called a democracy. The Constitution originally made no mention of individual rights, made no direct mention of slavery, nor mentioned who would participate in the administration of the new government. The states clamored for a Bill of Rights that was adopted in the form of the first ten amendments to the Constitution. There are now twenty six amendments to the Constitution. The last one that was passed was in 1971 giving the right to vote to eighteen year olds. The ERA failed to gain passage in June 1982.

The Power of the Judiciary

The power of the judiciary does not rest solely in the hands of the federal courts. There exists simultaneously in the United States a state court system. Each of the fifty states has a district or county court. There may be an appellate or superior court, and sometimes a state supreme court.

"Every state in the United States has its own court system created by its constitution or statutes, and most of

the judicial business of the country is carried on in the state courts, . . .

“ . . . in each state there are two parallel systems of courts sitting side by side, one state and the other federal. The problem of allocating business between them is of very great importance and is part of the greater problem of allocating power between the national and state governments in our complex and delicately balanced federal system.”²

This dual system of courts has created procedural problems in determining who has jurisdiction both between the federal and the state courts, and between one state court as opposed to another state court. This latter situation has been analyzed through the use of a set of “out of state motorist cases.” The origin of the dual system of courts comes from before the adoption of the Constitution. The laws that governed the people of the newly independent thirteen United States were the laws of the several states. The federal government was able to regulate interstate commerce and foreign affairs, but the law of the land was the law of the several states. Where did those laws come from?

Sources of Law

The Supremacy Clause, article VI, clause 2 of the United States Constitution states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Not only judges, but Senators, Representatives, members of the state legislatures, and all federal and state executive and judicial officers are bound by oath to uphold the Constitution. When one speaks of the Constitution this is also to mean the amendments to the Constitution as well. Many of the amendments guarantee individual rights and liberties. Many cases have come before the courts seeking relief under the first, fifth, and fourteenth amendments.

The first amendment states that Congress can make no law establishing a religion or prohibiting the free exercise of religion. It prohibits Congress from passing any law that will abridge the freedom of speech or of the press. It guarantees the right of the people to assemble peaceably and petition the government for a redress of grievances.

The fifth amendment contains the famous words that no individual “be deprived of life, liberty, or property, without due process of law.” The first clause of the fourteenth amendment adds to the concept of due process the right of equal protection. The fourteenth amendment states in part, “nor shall any State . . . deny to any person in its jurisdiction the equal protection of the laws.”

The Constitution grants Congress the power to pass legislation to enforce the Constitution. Laws passed by Congress provide a very large part of the legislative fabric of the United States. The study of the laws passed by Great Britain when it had sovereignty over the Thirteen Colonies is generally part of the study of United States Colonial history. Many United States history textbooks introduce the Stamp Act, the Tea Act, and the Intolerable Acts, among others, as causes for the War for Independence. Taxation without representation is a well known phrase. Yet once the Union was formed, and the Thirteen Colonies became the United States, most textbooks focus on George Washington, the first President, and give little emphasis to the legislative and judicial branches of government.

The first Congress passed the Judiciary Act of 1789, a law that was designed to organize the federal court system and provided for rules of procedure. It stated that in cases heard in the federal courts, “the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be the rules of decision . . . ”

Other examples of laws passed by Congress in order to enforce the rights guaranteed in the Constitution are the Civil Rights Act of 1866, the Civil Rights Act of 1964, and more recently the Equal Educational Opportunity Act of 1974.

A third source of law originating on the federal level are the various regulations issued from the agencies of government. These agencies are created by law of Congress and are empowered to make regulations that may detail remedies to rectify past injustices or practices that are not in spirit with the Constitution or laws of Congress.

The tenth amendment of the Constitution reserves to the states the powers not delegated to the federal government. Each state has a State Constitution which provides another very rich source of law. The right to an education, for instance, is not mentioned in the United States Constitution. Almost every state has some provision for compulsory education, and some state constitutions even say explicitly that education is a fundamental right. Some state constitutions go much farther in defining and protecting individual rights.

It may be pointed out to students that the nickname of Connecticut is the Constitution State. One might want to digress and investigate when the first constitution was written in Connecticut, and in the other colonies. A good reference for teachers interested in various education provisions of the several states’ constitutions may be found in “Rodriguez Revisited: federalism, meaningful access, and the right to an adequate education,” *Santa Clara Law Review* 20;75, Winter 1980.

Each state constitution empowers the state legislatures to pass legislation to enforce state law. These state laws may differ from state to state and provide texture to the fabric of United States law. This can easily be explained to students by examining the drinking age or the driving age in different states. Several states have passed Bilingual Education Laws and these laws may be studied and compared. Welfare laws in each of the fifty states are different. These may also be studied and compared. Much discussion has gone on about the equalization of school financing. To investigate this issue one might want to look at *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16-17 (1973) or *Horton v. Meskill* for financing equalization right here in Connecticut.

Another source of law are the ordinances passed by cities, towns, and other local governments. Examples of these laws may be parking rules, traffic laws, school districting and school board policy.

An extremely important source of law is common law. The common law is a body of rules and principles founded on custom, usage, and the decisions and opinions of the courts. It is derived mainly from practices developed in England, and as it applies to the United States, dates back to those which were in effect at the time of the War for Independence.

The concept of common law developed in medieval England. Royal representative, forerunners of today’s circuit court judges, were sent by the king to administer the law in distant areas of the kingdom. Because these representatives of the king were often unfamiliar with the practices of the area in which they presided, when a problem arose, they would ask local officials what decisions had been made in the past concerning similar situations. They would base their decisions on the previous rulings. As the justice system became more

organized, the idea of basing present decisions on past ones was systematized into the legal concept of precedent.

John Chipman Gray, in his book, *The Nature and Sources of the Law* gives a definition of the law. “The law of the state or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties.”³

Gray’s book is a detailed analysis of the sources of law with frequent references to Roman, German, and English law. This scholarly treatise explores the vast worlds of legal history that existed before the creation of the United States. Gray has included in his work a chapter on morality and equity. Even with the vast expanse of legal precedent and custom, Gray writes, “When a case comes before a court for a decision, it may be that nothing can be drawn from the sources heretofore mentioned; there may be no statute, no judicial precedent, no professional opinion, no custom, bearing on the question involved, and yet the court must decide the case somehow; the decision of cases is what courts are for . . . And I do not know of any system of law where a judge is held to be justified in refusing to pass upon a controversy because there is no person or book or custom to tell him how to decide it. He must find out himself; he must determine what the law ought to be; he must have recourse to the principles of morality.”⁴ It is exactly this unwritten higher law which helps to keep the law constantly changing and enables new laws to be written to codify principles to be found in the field of ethics. The law is not fixed but is constantly growing and being reinterpreted according to the custom of the day.

In the United States the Supreme Court speaks with absolute authority and gives an aspect of moral consciousness to the nation. Article III, section 1 of the Constitution states, “The Judicial power of the United States shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.” In Section 2 of the same article, the Constitution spells out when the Supreme Court is to have original jurisdiction and when it is to have appellate jurisdiction, stating, “In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original jurisdiction. In all other cases before mentioned the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”

Congress did indeed make a law concerning the regulation of the Supreme Court. In the Judiciary Act of 1789 Congress expanded the powers granted to the Supreme Court in Article III, Section 2. These expanded powers included the power to issue a writ of mandamus, or a court order to do something to any courts appointed or persons holding office under the authority of the United States.

This information on the Supreme Court serves as an introduction to the case material and provides important background for the first case study of this unit, *Marbury v. Madison*.

Case Material

The Right of Judicial Review

Marbury v. Madison

In 1801 William Marbury was named a justice of the peace for the District of Columbia by the outgoing Federalist President, John Adams. His commission was confirmed by the Senate and signed and sealed by acting Secretary of State Marshall. The commission was not delivered by the time the new president, Thomas

Jefferson a Republican, took office. Because the commission had not been delivered, Jefferson chose to treat it as null and void. Marbury decided to go directly to the Supreme Court to get a court order requiring the Secretary of State, James Madison, to deliver the commissions.

Marbury went directly to the Supreme Court because the Judiciary Act of 1789 gave the Supreme Court original jurisdiction in suits against public ministers and gave the court the power to issue writs of mandamus to persons holding office under the authority of the United States.

In deciding the case, Chief Justice Marshall determined that Marbury was indeed entitled to his commission. In searching for a remedy, Marshall commented on the fact that the writ was to be directed at a member of the President's cabinet. In doing so he established the fact that the Court had a right to examine acts of the executive branch.

If one of the heads of departments commits any illegal act, under color of his office, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgement of the law. ⁵

In describing United States government as one of limited powers, Marshall maintained that "the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written Constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society." ⁶

Marshall ruled that the Judiciary Act of 1789 was unconstitutional and found that he was without authority to issue a court order to make the Secretary of State, James Madison, deliver the commission to Marbury. Marshall had taken a new look at the powers granted to the Supreme Court and had carefully analyzed each word of the Constitution. His arguments for a strict interpretation led to excluding any authority not specifically enumerated in the original jurisdiction clause.

This opinion established the authority of the Supreme Court to declare laws of Congress, laws of the states and other legal practices as unconstitutional. This has come to be known as the Right of Judicial Review and has been commented on extensively in constitutional literature.

The right of judicial review has been exercised by the Supreme Court for almost one hundred eighty years. It has come into greater use since the Civil War and the passage of the thirteenth, fourteenth, and fifteenth amendments. It has been used by the court both to further the cause of civil rights and to uphold segregation, as in *Plessy v. Ferguson*. Judicial review enabled the court to reverse *Plessy* in 1954 by deciding in *Brown v. Board of Education* that separate but equal is inherently unequal. The Court looked at the Equal Protection Clause of the Constitution to make that decision. Many other important cases have been based on the principle of equal protection of the laws. One such case of particular interest to the language minority student is *Serna v. Portales*.

Before examining specific cases, let me reassert that the case material selected for this unit is of particular interest to the bilingual teacher, and may not be relevant for other teachers. It is important to select cases that are stimulating for both student and teacher. It is necessary to provide background information to build an adequate framework for the cases that follow.

The Constitution does not mention that English is the official language of the United States. The individual state constitutions very often have passages recognizing English as the official language of the nation. Some

states have clauses requiring all teaching in the school to be in English. The use of English in the schools had once been thought of as an effective tool to “Americanize” the population and assimilate ethnic minorities and foreign tongues in the melting pot of English.

In fact, the history of requiring that English be the sole language of instruction may indicate a desire to exclude ethnic, racial and national minorities from the schools.

For example, the California Constitution of 1849 required all laws and regulations to be published in both English and Spanish. After the gold rush, the influence of the English speaking majority was so great that the law was reversed, making all schools teach in the English language. In addition, laws were being passed that blatantly discriminated against the foreign population, namely the Chinese. The Constitution of 1879 was written to preclude the Chinese from voting.

Due to the desire to stop private religious schools, where instruction was sometimes in a language other than English, in the late 1800’s, laws were passed to make English the exclusive language of instruction. With the increase in immigration at the beginning of the twentieth century, World War I, and growing nationalism, the move to English accelerated. By 1903, fourteen states already required instruction in English; by 1913 the number had grown to seventeen and in 1923 it was thirty four. ⁷

In 1923 Meyer v. Nebraska was decided and the exclusive use of English was found to discriminate against citizens of foreign lineage. In Meyer the Court approved of the goal that the “English language should be and become the mother tongue of all children.” However the state was required to show that the method it used to implement this goal did not violate the rights of the students, parents, and teachers involved.

The Right to Learn

The Liberty to Practice One’s Profession

The Power of Parents to Control their Children’s Education

Meyer v. State of Nebraska

262 U.S. 390-403 (1923)

The plaintiff in this case, Mr. Meyer, had been tried and convicted in District Court in Nebraska. Meyer had been charged with unlawfully teaching the subject of reading in German to Raymond Parpart, a child of ten years old, while working as a teacher at the Zion Parochial School. This violated Laws 1919 of the State of Nebraska, which stated, “No person individually or as a teacher, shall, in any private, denominational, parochial, or public school, teach any subject to any person in any language other than the English language.”

Mr. Justice McReynolds delivered the opinion of the Supreme Court. In noting that the Supreme Court of Nebraska did not ban teaching of the ancient or dead languages, such as Latin, Greek, or Hebrew, he found that the Nebraska law materially interfered with the right to teach of modern language teachers. In addition, he found the Nebraska law to violate the rights of pupils to acquire knowledge and the power of parents to control the education of their own children. In his opinion, Justice McReynolds stated:

“The protection of the constitution extends to all, to those who speak other languages as well as those born with English on the tongue.”

The Supreme Court recognized that the Nebraska law essentially affected only those children of foreign origin. At the same time, the Court ruled that the goal of having all children speak English was Constitutionally permissible. This goal could not legally be reached through “methods which conflict with the constitution.” As a result of the Meyer decision, several other cases were decided and the Nebraska law was repealed.

In 1946, the District Court of California ruled on the case of Mendez et. al. v. Westminster School District. In this case Gonzalo Mendez, William Guzman, Frank Palomino, Thomas Estrada, and Lorenzo Ramirez filed a class action suit on behalf of their minor children and “some 5000” other children of Mexican or Latin descent.

Mendez v. Westminster

64 F. Supp. 544

The plaintiffs charged that the school district practiced discrimination by segregating and requiring Mexican and Latin children to attend certain schools reserved for and attended solely and exclusively by children and persons of Mexican and Latin descent, while other schools were maintained exclusively for White or Anglo-Saxon children.

District Judge McCormick stated in his opinion: “We perceive in the laws relating to the public educational system in the State of California a clear purpose to avoid and forbid distinctions among pupils based upon race or ancestry . . . ”

“The equal protection of the laws is not provided by furnishing in separate schools the same technical facilities, textbooks, and courses of instruction to children of Mexican ancestry that are available to the other public school children regardless of their ancestry. A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage.”

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In his decision in Mendez, Judge McCormick ordered injunctions against all defendants restraining further discrimination against Mexican students. This case which predates Brown by some eight years, echoes the sentiment “separate but equal is inherently unequal.” It did not deal with the fact that all instruction was in English and that equal instruction could also be inherently unequal. This did not come until the 1970’s with the Lau and Serna cases.

A state offering all students the same instruction in integrated schools does not appear to be classifying students. Yet in Lau v. Nichols the Supreme Court found that non-English speaking students were “foreclosed from any meaningful education.”⁹ The unequal educational opportunity of bilingual children is caused by the state action of requiring all children to attend school and requiring English as the sole language of instruction.

A possible goal of the state action is to provide educational opportunity to all children. The requirement for all children to attend school until a certain age assures the child of exposure to instruction. However, instruction solely in English would defeat this goal, when applied to bilingual children. Some have even argued that compelling bilingual children to stay in school without providing them minimum education is comparable to imprisonment or being held against one’s will without just cause.

A state could, if it chose to require all children to receive instruction in his or her primary language. This approach was adopted by the Fifth Circuit Court in United States v. Texas. The court after ordering desegregation of a dual system which separated Mexican-Americans ordered that English and Spanish be

used interchangeably as the language of instruction.

Bilingual Education is now the law of the land due to the important decisions reached in *Lau v. Nichols* and *Serna v. Portales*. The unit will examine these case materials, and will take a look at the Bilingual Education Act before providing some sample lessons and activities.

Lau v. Nichols

414 U.S. 563

Lau v. Nichols was a class action suit brought by Mrs. Kam Wai Lau, guardian for Kinney Lau, against officials responsible for the operation of the San Francisco Unified School District, seeking relief against the unequal educational opportunities provided non-English speaking Chinese students. The plaintiffs alleged their constitutional rights to equal protection of the laws guaranteed by the fourteenth amendment were being violated.

In 1973 there were approximately 2,800 non-English speaking Chinese school children in the San Francisco schools. Of these, only 1,000 were receiving special language instruction. The class action suit represented the 1,800 students who did not participate in any supplemental courses in the English language.

The United States District Court denied relief and the plaintiffs appealed. The United States Court of Appeals for the Ninth Circuit affirmed the decision. The Supreme Court agreed to hear the case because of the importance of the question presented.

Mr. Justice Douglas delivered the opinion of the Supreme Court. Reversing the decision of the lower court, Douglas held that the school system's failure to provide English language instruction denied meaningful opportunity to participate in public educational programs in violation of the Civil Rights Act of 1964. The decision ignored the constitutional question of equal protection.

In stating the reason for the court's decision, Douglas outlined several provisions of the California Education Code. This code states that, "English shall be the basic language of instruction in all schools." In addition, the Code requires that no student shall receive a diploma from grade twelve who has not met the standards of proficiency in English. Moreover, children between the ages of six and sixteen are "subject to compulsory full-time education."

Douglas stated in his opinion, "Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."

Justice Douglas relied solely on Section 601 of the Civil Rights Act of 1964 which bans discrimination "on the ground of race, color, or national origin" in "any program or activity receiving Federal financial assistance." Since the San Francisco Unified School District receives large amounts of money from the federal government, it was required "to rectify the language deficiency in order to open" the instructional program to students who had "linguistic deficiencies," as per Federal Regulation 11595, the 1970 Memorandum of HEW.

In relying on the Civil Rights Act of 1964, the Court made what may be called a "statutory decision," as opposed to the "constitutional decision" reached in *Serna*, based on the Equal Protection Clause.

Serna v. Portales Municipal Schools

499 F.2d 1147, 1154 (10th Cir. 1974)

In New Mexico in 1972-1973, 50% of all public school students were minority children. In 39 of the 88 school districts over 50% of the students were Spanish-surnamed. Extensive data indicates there is a significantly lower achievement among these students than their Anglo classmates.

The Constitution of the State of New Mexico requires compulsory school attendance. In addition, the state constitution requires that public school teaching be in the English language. The combination of these two policies created a "Catch-22" for non-English speaking children which effectively denied them participation in the educational process.

The parents of Judy Serna, and other Spanish-surnamed students joined together in a class action suit against the Portales Municipal Schools. The plaintiffs charged that the school district failed to provide bilingual-bicultural education and failed to hire teachers of Mexican-American origin who could meet the needs of the non-English speaking students. The suit claimed that this denied the students equal educational opportunity as guaranteed by the equal protection clause of the fourteenth amendment and violated rights secured by Title VI of the 1964 Civil Rights Act.

The Court agreed with the plaintiffs and found that Spanish-surnamed children were in fact being denied equal educational opportunity. The court granted Serna relief holding, "the conclusion becomes inevitable that these Spanish-surnamed children do not in fact have equal educational opportunity and that a violation of their constitutional right to equal protection exists."

The court, in deciding for Serna, directed to Portales Municipal School District to implement a remedial plan as required by the 1970 Memorandum issued by HEW which states:

Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students. ¹⁰

The Serna and Lau cases mandate that a school district which accepts Federal funds must act to implement some form of Bilingual Education for non-English speaking students. For a detailed analysis of the various types of language instruction programs employed see Holmes, "Bilingual Education," *New Mexico Law Review*, 5-321-333.

Congress quickly affirmed its support for Lau by enacting Section 1703f of the Equal Educational Opportunity Acts of 1974. In November 1978, the Congress reauthorized Public Law 95-561, Title VII, section 701, 92 Stat. 2268, commonly known as the Bilingual Education Act. Congress appropriated \$200,000,000 for Bilingual education in 1979, gradually escalating up to \$400,000,000 for fiscal year 1983. The Act states:

(a) Recognizing-

- (1) that there are large numbers of children of limited English proficiency;
- (2) that many of such children have a cultural heritage which differs from that of English-speaking persons;
- (3) that a primary means by which a child learns is through the use of such child's language and cultural heritage;
- (4) that, therefore, large numbers of children of limited English proficiency have educational

needs which can be met by the use of bilingual educational methods and techniques;

(5) that, in addition, children of limited English proficiency and children whose primary language is English benefit through the fullest utilization of multiple language and cultural resources;

(6) children of limited English proficiency have a high dropout rate and low median years of education; and

(7) research and evaluation capabilities in the field of bilingual education need to be strengthened,

the Congress declares it to be the policy of the United States, in order to establish equal educational opportunity for all children (A) to encourage the establishment and operation, where appropriate, of educational programs using bilingual educational practices, techniques, and methods, and (B) for that purpose, to provide financial assistance to local educational agencies, and to state educational agencies for certain purposes, in order to enable such local educational agencies to develop and carry out such programs in elementary and secondary schools, including activities at the pre-school level, which are designed to meet the educational needs of such children, with particular attention to children having the greatest need for such programs; and to demonstrate effective ways of providing, for children of limited English proficiency, instruction designed to enable them, while using their native language, to achieve competence in the English language. ¹¹

Congress has come nearly full-circle from the days before Meyer when various states had laws that made it illegal to teach in a language other than English. The evolution of bilingual legislation is a typical example of the process of growth and change in the law. It is a dynamic process that strives to preserve fundamental rights and insures that social practice is just and in accordance with the Constitution of the United States.

Sample Lessons

Rationale:

The material included above may be utilized in the classroom at almost any level, from elementary to twelfth grade. In the lower grades one might discuss the American flag, the pledge of allegiance, and begin to introduce concepts of American government.

The material might be used in a twelfth grade advance placement class as well. The teacher might choose to discuss specifically the technicalities in *Marbury v. Madison*, introducing vocabulary such as original jurisdiction, appellate jurisdiction, writ of mandamus, etc.

This unit is intended to be used at the middle school level.

Sample Lessons

Lesson 1

Sources of Law

Suggested Classroom strategy

Objective

-to help students classify information

-to acquaint the student with the different sources of United States law

Performance Objectives

-given a set of categories of sources of law, the student will classify various acts of Congress, the Supreme Court, the President, the agencies of Government, the states, and other courts, in their respective categories.

Activity 1.

-the teacher will write on the blackboard, the following sources of United States law:

<i>The Constitution</i>	The Bill of Rights	Laws of Congress
<i>Federal Regulations</i>	State Constitutions	State Laws
<i>Local ordinances</i>	Judicial Precedent and Court Decisions	
<i>Custom</i>	Ethics and Morality	

-the teacher will then give the following list to the students and the students will categorize according to the above sources.

the original jurisdiction clause
The Judiciary Act of 1789
Marbury v. Madison
the Equal Protection Clause
the due process clause
the right to assemble peaceably
the enumerated powers clause
Meyer v. Nebraska
Law 1919 of Nebraska
Mendez v. Westminster

local school districting that segregated Mexicans from Whites
the use of English in school
the 1970 Memorandum
the Bilingual Education Act
The Civil Rights Act of 1964
Lau v. Nichols
Serna v. Portales
Regulation 11595

Sample Lessons

Lesson 1

Possible Outcomes

It is very likely that the material presented in lesson one is too difficult and that the activity described above may not be realizably unless the teacher backtracks to present definitions and explanations.

Follow-up activities would include a general class discussion on the source of law. Where do laws come from? God? Once this particular discussion has begun it can often become very emotional, touching students' most

fervent religious feelings. This often brings about a very active class discussion. It is hoped that this interest can motivate students to participate more in the lessons.

The teacher may have to follow up with a series of classes, each one concentrating on a single theme, the Constitution, Laws of Congress, Regulations. An activity designed to encourage student participation and active comprehension of the concepts involved is described below in lesson two.

Lesson 2

Sources of Law

Suggested Classroom Strategy

The students will write a homework policy for the class. The teacher will present to the students the “Supreme Law of the Class, the Class Constitution,” which might state “In order to create a more literate citizen, everyone must attend school,” or something to that effect. The constitution then authorizes the Class Congress to make laws to create more literate citizens.

Performance Objective: given the task of preparing a homework policy for the class, the students will participate in role-playing activities, and will write one class rule concerning homework.

Activity 1—the teacher will write on the blackboard the following:

The Constitution

orders everyone to attend school

empowers Congress to make laws

Congress

makes law that all students shall do homework

gives to Education Agency the power to make

rules and regulations

Sample Lessons

Lesson 2

The teacher will explain to the class that they are to pretend that they are the “Federal Education Agency”. It is important to make clear to students that they, as an agency, get their power to make rules from the Congress. Remind students that Congress has passed a law ordering all students to do homework. It is their job to make the homework rules. How many minutes a night? Can a teacher give homework on the weekends? On vacations? Can a parent help a student with homework? What should be done if a student does not do

homework? If a student copies? These questions are only several suggestions for the teacher to guide the discussion along.

Activity 2

The students will elect a class secretary to write down the homework rules that are suggested. These rules can then be copied on the board and discussion in favor or against the various rules should take place. The students will vote on the homework policy rules and agree on one rule that will serve as a part of the class's homework policy.

Follow-up activities would include asking the students to develop a plan how they would enforce the rule they made. What would they do if the rule were not adhered to? The teacher could then review the concepts involved by asking these review questions?

1. Where did the class get the power to make these rules?
-The class is an "agency" of Congress. Congress gave the power to make rules to this agency.
2. Where does Congress get the power to make laws?
-The Constitution empowers Congress to make laws to help create literate citizens.

With this material as background the teacher will then explain to the students that the United States Congress has indeed passed an act to ensure equal educational opportunity. The Congress at the same time has empowered the office of HEW to make rules and regulations consistent with the statute.

The statute to be discussed below in lesson three is the Bilingual Education Act. It will be explained to the students that the fourteenth amendment of the Constitution requires equal protection of the laws. Students will learn that the courts have interpreted this to mean that if school instruction is in a language that the students cannot understand, students are not receiving adequate education, and are being denied equal protection of the laws. The job of Congress is make laws to enforce the principles of the Constitution.

Sample Lessons

Lesson 3

Bilingual Education

Suggested Classroom Strategy

Objective

- improve the students communication skills

-to familiarize students with methods of social studies research: survey, questionnaire

Performance Objective

-given a set of questions the student will interview at least three members of his family, school, church or community groups, will write down responses and report back to the class.

Activity 1.

-the teacher can read parts of the text of the Bilingual Education Act as a dictation. The students will listen and write down the exact text as read.

Activity 2.

-vocabulary development; the teacher should develop a list of vocabulary words to help students comprehend their reading.

limited English proficiency	segregation
cultural heritage	integration
bilingual	compulsory
bi-cycle	truant
-centennial	ESOL
-sexual	Anglo
dropout	language minority

Activity 3

-develop a set of research questions; the teacher will initiate a discussion concerning the issues mentioned in this unit, beginning with the right of equal protection, due process, Meyer, Mendez, Lau and Serna, and will write the questions developed on the blackboard. The students will then copy the questions, or the teacher can prepare a questionnaire ditto format so that the responses can be uniform.

Discussion Questions

1. The Bilingual Education Act states that there are large numbers of limited English proficiency

children.

How many non-English speaking children are there in your school?

How many non-English speakers are there in your grades?

In other grades? In your entire town's school system?

How can one find out this information?

One can interview the school's head clerk; or call downtown to the Department of Education.

This information can be compiled in class, shared with other student and can be graphed and plotted on the blackboard in various ways, bar graph, line graph, etc.

2. Can we prove that many of the non-English speaking students share a different cultural heritage? Students may want to ask the following questions: -What language do you use at home? to your parents?

-What language do your parents use when they talk to you?

-What holidays do you celebrate? Christmas? Three Kings' Day? Yom Kippur? San Juan Bautista? the Assumption? etc.

-What music do you listen to? Who are your favorite recording artists and musicians?

The teacher may want to help students to classify their information and give names to the cultural heritages represented.

3. The children of non-English proficiency have a high dropout rate. Can this be proven? The students can find out from the central office of the school system how many Hispanics entered in ninth grade and how many graduate four years later. This information can be graphed and analyzed to compute the local dropout rate.

4. People have a low median years of education who have limited English proficiency. All the people interviewed in item 2 above who answered that they use a language other than English, can be asked how far the reached in school. This information can be compared to those people who use only English.

5. Have you ever heard of the Case of Meyer v. Nebraska?

6. Do you feel that parents should have a right to control their children's education?

7. Do you feel that students have a right to acquire knowledge? of other cultures? languages?

-Should Anglos be permitted in bilingual programs?

8. What does bilingual education really mean?

-education in a language other than English only?

-very little emphasis on English?

-immersion in English?

9. Should bilingual students be segregated from Anglo students? are they? why?

10. Should bilingual students have equal access to educational facilities? laboratories, gyms, libraries, home economics, shop etc.? Do they? If not, why not?

11. Are you aware of the 1970 Memorandum of HEW? Do you feel that your local school district is taking affirmative steps to remedy language deficiencies of students?

12. The teacher is left at her discretion to develop appropriate questions depending on the skill levels and interests of her students.

Notes

1. Gunther, G. *Cases and Materials on Constitutional Law* ninth edition, The Foundation Press, Inc., Mineola, N.Y. 1975. p. 5.
2. *The American Court Systems* , p. 32, 35. see ABA Standards Relating to Court Organization, section 1.10; Pound, *Organization of Courts* (1940).
3. Gray, John Chipman, *The Nature and Sources of the Law* 2nd edition, The Macmillan Co. 1921, p.84.
4. *Ibid* . p. 302.
5. Gunther, *op. cit* . p. 7.
6. *Ibid* . p. 10.
7. Johnson, Wm. "Linguistic Exclusion of Bilingual Children from an Equal Educational Opportunity: A Denial of Equal Protection" *So. Cal. Law Review* Vol. 47, 971-997, 1974. p. 982-983.
8. *Mendez v. Westminster*, 64 F. Supp. 544 p. 549.
9. See also *San Antonio v. Rodriguez*; *The Right to a Minimal/Adequate Education*.
10. 35 Fed. Reg. 11595 (1970).
11. The Bilingual Education Act 1978, §§701-751 20 USC §§ 3221-3261.

BIBLIOGRAPHY AND CASE INDEX

Brown v. Board of Education

347 US 483 (1954)

Brown II

349 US 294, 301 (1955)

Foster, W.P. "Bilingual Education: An Educational and Legal Survey" *Journal of Law and Education* 5:149-71

April '76.

for a discussion of the differences between assimilationist and pluralist goals in bilingual education.

Gray, John Chipman

The Nature and Sources of the Law, 2nd edition, New York, The MacMillan Co. 1921.

an old classic that gives most scholarly attention to the long history of law, from the Greeks, Romans, Hebrews, morality; covers all sources of law; excellent background, but can be very dry.

Grubb, Erica Black

“Breaking the Language Barriers: The Right to Bilingual Education” Harvard Civil Rights Law Review 9-52-94 Jan. '74.

compulsory school attendance with incomprehensible instruction is a deprivation of liberty without due process of law; contains excellent statistics on the number of school age children from non-English speaking homes (over five million), with only 112,000 (2.2%) enrolled in bilingual; great number of cross-references in the footnotes; can lead to further research.

Guadalupe Organization Inc. v. Tempe Elementary School

District No. 3

587 F 2d 1022 (9th Cir. 1978)

a case where the court found that bilingual programs were not constitutionally mandated, but up to local school district

Gunther, Gerald *Constitutional Law: Cases and Materials* 9th edition Mineola, N.Y. The Foundation Press 1975.

the definitive textbook in constitutional law; bottomless source of cases and information

HEW Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under *Lau v. Nichols* (Aug. 11, 1975)

commonly known as the Lau Remedies; involves classifying students according to language dominance to insure that non-English proficient children receive bilingual education

Holmes, Joseph

“Bilingual Education: *Serna v. Portales Municipal Schools*”

New Mexico Law Review 5-321-333

a scholarly comment in the state law school where the case took place; many excellent cross-references

Kluger, *Simple Justice*

an excellent narrative of the injustices of segregation leading up to Brown v. Board; interesting anecdotes of the South; the detailed history of Brown v. Board.

Lau v. Nichols 414 US 563

a statutory decision in favor of bilingual education based on Title VI of the 1964 Civil Rights Act

Marbury v. Madison 1 Cranch 137 , 2 L.Ed. 60 (1803)

the right to judicial review

May 25, 1970 Memorandum HEW

35 Fed. Reg. 11595 (1970)

specific order to remedy language deficiencies to provide equal educational opportunities

Mendez v. Westminster 64 F. Supp. 544 (1946)

court found it illegal to segregate Mexicans in Mexican only schools, and Anglos in Whites only schools; separate but equal inherently unequal

Meyer v. Nebraska 262 US 390, 401 (1923)

court ruled cannot deprive one of useful occupation without due process of law; right of pupils to acquire knowledge; right of parents to control their children education

“Rodriguez Revisited: Federalism, Meaningful Access, and the Right to Adequate Education” Santa Clara Law Review 20:75 v-121 Winter 1980.

a scholarly comment in law journal about the issues involved in the financing equalization case in Texas; discusses minimal/adequate education v. equal education

San Antonio Independent School District v. Rodriguez 411 US 1, 16-17 (1973)

the school finance equalization case

Serna v. Portales Municipal School District 499 F. 2d 1147, 1154 (10th Cir. 1974)

the landmark case that decided that not providing bilingual education is a violation of rights under the equal protection clause of the fourteenth amendment

“The American Court Systems” handout, Constitutional Law seminar, Yale-New Haven Teacher Institute, 1982.

an overview of the structure and jurisdictions of state and federal courts; explains the dual system of courts in the United States

“The Constitutional Right of Bilingual Children to an Equal Educational Opportunity” So. California Law Review 943, 979-85 (1974)

another look at the Lau, and Serna cases with background information on the history of bilingual education

and English language statutes

Title VI Civil Rights Act of 1964 42 USC §2000d (1976)

the statute used in the Lau decision; prohibits discrimination in school districts receiving federal funds

Title VII The Bilingual Education Act §§701-751, 20 USC §3221-3261 Supp. 1979

legislation declaring bilingual education to be the policy of Congress and granting federal funds for bilingual education

STUDENT BIBLIOGRAPHY

The following is a short list of the books available in Spanish that can be used in the bilingual social studies of United States History classes.

Diaz Cubero, Jose H.

Historia del Pueblo de Los Estados Unidos de América Compañía Cultural Editora y Distribuidora de Textos Americanos, S.A. 1979, printed in Spain

Nevins, Allan, & Commager Henry Steele

Historia de los Estados Unidos Sexta edición 1972

Cia General de Ediciones, S.A. Mexico

Perez Martinez, Aurelio *El Viejo Mundo y Sus Pueblos* cuarta edición 1976 Cultural Centroamericana, S.A.
printed in Spain

Perez Martinez, Aurelio *Las Americas y Sus Pueblos* cuarta edición, 1975 Cultural Centroamericana, S.A.
printed in Spain

Roy, Joaquin

El Gobierno y Los Presidentes

Domus Books, Northbrook Illinois 1980

Wright, Louis B. et. al.

Breve Historia de los Estados Unidos

Editorial Limusa Mexico 1976

<https://teachersinstitute.yale.edu>

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